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UNITED STATES SUPREME COURT
October 1983 term

GALAHAD V. WEINSHIENK, et. al.

&

GALAHAD V. WOODS, et. al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) IS NOT THAT WHICH IS ACTUALLY DETERMINED BY THE PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS BY WHICH ONE IS ADMITTED TO THE PRACTICE OF LAW IN ONE UNITED STATES DISTRICT COURT, PRECISELY WHAT IS REQUIRED BY SECTION 1 ARTICLE IV OF THE UNITED STATES CONSTITUTION AND 28 UNITED STATES CODE 1738 TO BE GIVEN FULL FAITH ANL CREDIT BY EVERY OTHER UNITED STATES DISTRICT COURT WITHIN THIS NATION? (83-1155 CA 10)

2) IS NOT THAT WHICH IS ACTUALLY DETERMINED BY THE PUBLIC ACTS, RECORDS, AND JUDICIAL PROCEEDINGS BY WHICH ONE IS ADMITTED TO THE PRACTICE OF LAW IN THE COURTS OF ONE STATE, PRECISELY WHAT IS REQUIRED, WITH NO APPLICABLE EXCEPTION, BY SECTION 1 ARTICLE IV OF THE UNITED STATES CONSTITUTION AND 28 UNITED STATES CODE 1738 TO BE GIVEN FULL FAITH AND CREDIT BY THE COURTS OF EVERY OTHER STATE WITHIN THIS NATION? (82-1092 CA 10)

LIST OF ALL PARTIES IN THE COURT BELOW

83-1155 CA 10) Individually, and in their representative capacity, all judges of the Colorado U.S. District Court; at the time of filing the complaint: Zita L. Weinshienk, John L. Kane Jr., Sherman G. Finesilver, Richard P. Matsch, Jim R. Carrigan, John Moore, Alfred A. Arraj, Fred M. Winner, and Hatfield Chilson.

82-1092 CA 10) Individually, and in their representative capacity: All members of the Colorado State Board of Law Examiners; at the time of filing the complaint, Lucius Woods, Maurice Ruler, Carlos Lucero, John Law, Charles Kuechenmeister, Greg Hoskin, Howard Holme, Robert Dunlap, and Carolyn Daniels. And all Justices of the Colorado Supreme Court; at the time of filing the complaint, Luis D. Rovira, Joseph R. Quinn, George E. Lohr, Robert E. Lee, Paul V. Hodges, William H. Erickson, and Jean E. Dubofsky.

TABLE OF CONTENTS

Questions Presented for Review.....i
List of All Parties.....ii
Table of Contents.....iii
Table of Authorities.....v
Reports of Previous Opinions.....vii
Constitutional Provisions,
Statutes, and Rules.....viii
District Court Federal Jurisdiction....x
United States Supreme Court
Jurisdiction.....xi

Statement of the Case.....01
Primary Facts.....01
Ancillary Facts.....04
Argument.....10
Intelligence; Justice; Law.....10
Detailed Elaboration of the Exact
Nature of this Petition.....12
NO claim is made for
automatic admission.....12
NO challenge is made to the
power to separately set
admission criteria.....12
This Court is requested only:
to DECIDE what it is that
is actually determined;...14
and to DECIDE what subset
of that requires Full
Faith and Credit.....14
Full Faith and Credit is
Appropriate for this Matter.....15
There is No Applicable Exception...27
Policy Considerations.....34
Current admission procedures
are non-intelligent.....34
A bad example is set by
the judiciary.....42
The abject DANGER is not seen...46

The sense of elitist superiority is the origin of incompetence.....52
Division produces violence.....55
Conclusion.....63

Appendix.....1001
Order and judgment of the 10th Circuit sought to be reviewed...1001
Memorandum opinion of the U.S. District Court in 82-1092 CA 10.....1005
Memorandum opinion of the U.S. District Court in 83-1155 CA 10.....1018
Enhancing the Competence of Lawyers.....1060
Errors in the 10th Circuit order and judgment.....1075

TABLE OF AUTHORITIES

page

Allen v. McCurry, 449 U.S. 90 (1980).....19
Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).....21
Baldwin v. Iowa State Traveling Mens' Assn., 283 U.S. 525 (1931)...19
Davis v. Davis, 305 U.S. 32 (1938)....15
Federated Dept. Stores, Inc. v. Moitie, 101 S.Ct. 2424 (1981).....19
Hilton v. Guyol, 159 U.S. 113 (1895).....19
Huron Holding Corp. v. Lincoln Mine Op. Co., 312 U.S. 183 (1941).....15
Johnson v. Muelberger, 340 U.S. 581...25
Magnolia Petrol. Co. v. Hunt, 320 U.S. 430 (1943).....20,21
Milwaukee Cty. v. M.E. White Co., 296 U.S. 268 (1935).....21,25
Riley v. N.Y. Trust Co., 315 U.S. 343 (1942).....21
Schware v. Bd. Bar Exam., 353 U.S. 232 (1957).....26
Sherrer v. Sherrer, 334 U.S. 343.....25
Thomas v. Wash. Gas Light Co., 448 U.S. 261 (1980).....21,25
Williams v. N. Carolina, 317 U.S. 287 (1942).....21

Section 1 Article IV, United States Constitution.....viii,15
The Declaration of Independence.....63

28 United States Code 1738.....viii,15

Rule 1-a, Local Rules of Practice, U.S. District Court, Colorado.....ix

Ethical Considerations 8-2,8-9,
Code of Professional
Responsibility.....09

"Enhancing the Competence of Lawyers,
the Report of the Houston
Conference, February 3 through
5, 1981".....1060
et. sec.

Carlyle, Thomas; The French
Revolution.....63
Gibbon, Edward; The Decline and Fall
of the Roman Empire.....63
Thucydides; The History of the
Peloponnesian War.....63

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REPORTS OF ANY PREVIOUS OPINIONS

The opinion of the U.S. District Court in 83-1155 CA 10 (81-1205 there), District Judge Bruce S. Jenkins of Utah sitting by designation, was reported at 555 Federal Supplement 1201.

The predecessor case to the instant ones, arising out of the same facts, was before this Court on a petition for a writ of mandamus in 81-1004 U.S.S.C.; denied 11 January 1982, 454 U.S. 1139.

CONSTITUTIONAL PROVISIONS; STATUTES; AND RULES

Section 1 Article IV, U.S. Constitution:

Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

28 United States Code 1738:

.....

Such acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same Full Faith and Credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken.

Rule 1-a, Local Rules of Practice for the Colorado U.S. District Court

(a) The bar of this Court shall consist of those persons admitted to practice before it. Persons admitted to practice in the courts of the State of Colorado and residing or maintaining an office in Colorado, may be admitted to the bar of this Court upon motion of a member of the bar of the Court representing that the applicant is of good moral character. Each person admitted to the bar of this Court must take the prescribed oath, must sign the roll of attorneys, and must pay the prescribed fee.

DISTRICT COURT FEDERAL JURISDICTION

Jurisdiction in the District Court in 83-1155 CA 10, was conferred by 28 U.S.C. 1331. The action arose under 28 U.S.C. 2201-2202; Section 2 Article IV, and Section 1 Article IV of the U.S. Constitution, and 28 U.S.C. 1738; 15 U.S.C. 2, 15, and 26; and the Fifth Amendment to the U.S. Constitution.

Jurisdiction in the District Court in 82-1092 CA 10, was conferred by 28 U.S.C. 1331 and 1343(3); and 15 U.S.C. 26 and 15. The action arose under Section 1 Article IV and the 14th Amendment to, the U.S. Constitution; 28 U.S.C. 2201-2202; 15 U.S.C. 2; and 42 U.S.C. 1983.

U.S. SUPREME COURT JURISDICTION

28 U.S.C. 2101(c) permits a petition for certiorari to this Court to be filed within 90 days after judgment is entered.

The date of the judgment sought to be reviewed in these two consolidated cases was 2 September 1983. The time of entry is believed to be the same.

No rehearing was sought.

The statutory provision believed to confer United States Supreme Court Jurisdiction is 28 U.S.C. 1254(1).

An Order extending the time in which to file the petition for writ of certiorari to this Court until 12 December 1983 was signed by Justice Byron R. White on 20 October 1983 (A-281).

STATEMENT OF THE CASE

Primary facts

These two consolidated cases concern yet another currently-prevalent manifestation of the abject, perhaps-terminal, degeneracy of this nation's legal profession, which stubbornly nurtures within itself the very injustices and non-intelligent actions which are its duty to exterminate.

Petitioner-Appellant-Plaintiff, Giles Galahad, since 1972 admitted to the practice of law and in good standing in Pennsylvania, and currently also admitted and in good standing in the State of Alaska, (1979) the United States Patent and Trademark Office, the United States District Court for the Eastern District of Pennsylvania, and the United States Court of Appeals for the Third Circuit; was notified by the Colorado State Board of Law Examiners in October of 1980 that his July 1980 Colorado Bar Exam was considered unsatisfactory even though

it was scored at 71.4 points (where 70 was the line anywhere above which an applicant was considered to be "minimally competent" to practice law in Colorado).

This was due to a particularly peculiar purported application of a Grading Standard "C", shortly thereafter repealed by the Colorado Supreme Court, not however with regard to Mr. Galahad; which required a minimal performance on the "essay" segment of the exam, regardless of the overall score; the rest of the grading standards evidencing an obvious intent not to so elevate the significance of that segment.

Upon a reading of the "essay" exam papers together with the grading criteria, Mr. Galahad uncovered a multitude of blatantly obvious grading errors (which more than accounted for the marking of the "essay" segment as not passed), the most egregious of which was the disallowance of a large group of points for the non-

use of LATIN words.

Pursuant to Standard #23 of the Code of Recommended Standards for Bar Examiners; of the American Bar Association, the National Conference of Bar Examiners and the Association of American Law Schools; Rule 217 of the Colorado Supreme Court has and does permit absolutely NO review of the exam grading.

At and since this point, Mr. Galahad found himself astonished and shocked by the non-intelligence of the injustice he was undergoing.

Mr. Galahad submitted examples of his previous professional written work to the Colorado Board of Law Examiners in a petition to them in an attempt to obtain a waiver, but to no avail. Following a likewise denied petition to the Colorado Supreme Court, suit was initiated in the federal District Court against the Board of Examiners and the Colorado Supreme Court.

Rule 1-a of the Local Rules for the United States District Court for Colorado restricts general admission to the practice of law before it to those admitted to practice before the Colorado Supreme Court. Following a denial of Appellant's petition to be admitted to practice in the District Court, the only place he would be practicing as a patent lawyer, suit was filed against the Judges of the U.S. District Court for Colorado.

This instant petition results from the affirmance by the Tenth Circuit U.S. Court of Appeals of the dismissal of these two suits in the U.S. District Court.

Ancillary facts

For Mr. Galahad, the cumulation of the non-admittance to the practice of law in Colorado because of the non-use of Latin words on the bar exam; the non-admittance even though nonetheless more than a passing score was obtained; the non-admittance

even though the grading standard ostensibly responsible was repealed; the non-admittance due to the policy of absolutely no review of exam misgrading; and the non-admittance to the federal District Court due to the non-admission in the Colorado courts regardless of previous federal and state admissions and work history: is simply too much.

Mr. Galahad now finally and belatedly, but quite clearly, perceives that this is anything but the honorable profession it is disingenuously asserted to be, but rather is the primary breeding ground for the spirit of sophisticated cruelty towards one's fellow man which rages uncontrolled throughout this society. This profession has degenerated to the point where right and wrong, rather than being vitally clear perceptions, have become merely idealogical concepts to be cleverly manipulated in a game to one's own advantage.

Mr. Galahad simply cannot in good faith and good conscience continue to expend his life force in this degenerate direction so long as it remains degenerate, so long as the degeneracy of the legal profession remains unacknowledged by those who control it. Filth swept under the rug can do nothing but continue to breed more filth.

Mr. Galahad has been blessed with sufficient energy to look for and find something else to do in life, be it ever so humble, so long as it is honest, which the legal profession of this nation is currently incapable of being.

But while Mr. Galahad was a member of it, he took the Law seriously; dead seriously. He had the profound misfortune to imagine that the Law had something to do with right and wrong, with justice, with intelligence. For him the Law was not a job, not a career, not a path to money or

position or status, but a means by which he could sincerely endeavor to leave this world a better place than that into which he came. To him the Law was a twenty-four hour a day affair; he ate, slept, breathed the Law; to him it was more important than family or friends, recreation or amusement; it was his entire life. His previous practice in the law was not merely good, but exemplary; he does not strive after integrity, he lives it; and he discards his hard-won profession rather than compromise his integrity by knowingly reducing himself to the level of a circus animal jumping through hoops.

Having taken it this seriously, Mr. Galahad cannot walk away from the legal profession without discharging his responsibility to it of pointing out to those in control of it to the maximum extent of his energy and ability, the profound degree of degeneracy which obviously permeates it; here manifested in the fraud-upon-the-pub-

lic of multiple entry-level bar exams.

This circus hoop-jumping of multiple entry-level bar exams, existing even among the federal District Courts, is wrong, dead wrong; and directly produces within the profession extremely poor spirit and the consequent incompetence attendent thereon. It is an indictment of the entire profession; and directly generates disrespect of the profession for itself and all manner of resulting dishonesty.

It is the responsibility of every lawyer within this nation who has even a hope that the legal profession might eventually have something to do with justice and intelligence to solemnly resist this and all other manifestations of the legal profession's current degeneracy; pursuant to Ethical Considerations 8-2 and 8-9 of the Code of Professional Responsibility, here reproduced for the benefit of those of us who remember them at best very dimly:

8-2: Rules of law are deficient if they are not just, understandable and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

8-9: The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

It is almost certain that Mr. Galahad will not prevail in this matter. Regardless, Mr. Galahad rather would have no profession at all, than one of which he is ASHAMED.

He does not practice now.

* *

ARGUMENT

Intelligence; Justice; Law

Justice is a conceptual approximation to intelligence. In the presence of intelligence justice is superfluous. Law is a theoretical approach to justice. In the presence of justice law is superfluous.

The complete absence of intelligence, justice, and law produces intense disorder. The labor of those involved in the law is at best towards the elevation and maintenance of the society of mankind above and away from this disorder.

Law is the effort to regulate human interpersonal relationships through rationality, rather than emotions. Rationality, though, is clearly a function of THOUGHT. As are emotions. And thus, although regulation through rationality is a relative improvement over that by emotions, both are equally non-intelligent, being functions of thought. Intelligence is not a function

of thought. Thought is forever of the past. Intelligence is timelessly of the present.

Necessarily then, all efforts of those in the law are at best still two steps removed from intelligence. A clear continuous awareness of this results in a healthy humility in those who administer the law which adverts their escalation of the importance of law above that of justice and intelligence.

* *

Detailed elaboration of the exact nature of this petition

As sharply defined and rigorously limited by the precise language of the sole and only issue presented for review in this petition, there are certain items that simply are not relevant to the adjudication of this petition.

For instance, although such a change would of course be eminently sensible, absolutely NO claim is made in this petition that admission to the practice of law in one court entitles one to automatic admission to the practice of law in another court.

And, although such a further change would of course be eminently sensible, absolutely NO challenge is made in this petition to the currently prevailing custom of permitting courts to individually define (but not merely to abdicate), so far as constitutionally permissible, their own criteria for admission to the practice of

law before themselves.

Thus, as sharply defined and rigorously limited by the precise language of the sole and only issue presented for review in this petition, this petition is submitted to this Court for consideration solely on the narrow issue of constitutional Full Faith and Credit; which is an area of the conflicts of laws where judicial decisions are made on large-scale policy considerations from a position of discretionary equity.

Petitioner most emphatically and quite passionately points out the blatantly obvious fact that something quite material, whatever its precise nature may ultimately be found to truely be, within the entire course of the public acts, records, and judicial proceedings which culminates in one being admitted to the practice of law in one court, is constitutionally required to be accorded Full Faith and

Credit by all other courts; and not be repeated ad infinitum, ad nauseum, thereby degenerating the spirit and self-respect of the entire profession.

Thus in this petition, this Court is requested to:

DECIDE as a matter of law precisely what it is that is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in a court of this nation; and then

DECIDE as a matter of federal policy from a position of discretionary equity, what particular subset of that which has thus been decided to be that which is actually determined, is precisely what is constitutionally required to be accorded Full Faith and Credit by all other Courts, federal or State, within this nation.

*

Full Faith and Credit is Appropriate For This Matter

Section 1 Article IV of the United States Constitution:

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State.

28 United States Code 1738; 3rd para.:

> Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal courts must give Full Faith and Credit to the judgments of state and territorial courts, and to each other. Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941); Davis v. Davis, 305 U.S. 32 (1938).

The admission to practice law is generally by means of a swearing in at a public ceremony before the judiciary, literally a "public act". The certificate of

admission is usually somewhat elaborate and affixed with an official seal, copies of which are always available for use in other jurisdictions, so therefore a "public record". The admission to practice law is initiated, prosecuted, and finalized before the judiciary, so therefore a "judicial proceeding". Before admitting one to practice, a court always requires documentation from all previous jurisdictions as to one's record there as a lawyer, so the authentication requirement is thus also satisfied.

Therefore, that which is <u>actually</u> determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in one court within this nation, whatever its precise nature may ultimately be found to truely be, falls within the illustrative description of what must constitutionally be accorded Full Faith and Credit by all

other courts within this nation.

Full (not sparingly, but generous)
Faith (in the good faith efforts of
& sister jurisdictions)
Credit (for what has been conclusively
settled once and for all)

The quintessential wisdom of Full Faith and Credit, and claim preclusion (res judicata) and issue preclusion (collateral estoppel) in general, is that a matter once fairly conducted in a forum of competent jurisdiction must be regarded, out of a consideration at least for judicial economy, if not for justice and intelligence, as finally SETTLED. And therefore not subject to continual disgraceful inhumane exhumation over and over again ad nauseum from one jurisdiction to another ad infinitum.

In essence, the demand as of right by a graduate of an accredited law school to be licensed to practice law, requires an adjudication by the court before whom he requests to practice, whether or not

static fact-finding is delegated to an "administrative" arm of that court, that the applicant does in fact possess sufficient credentials to enable him to BEGIN to demonstrate what will take place, take form, as the dynamic, the dynamically ever-changing path of his professional legal career.

The demand to be licensed to practice law is an adversarial proceeding between the applicant and the entire national profession of judges and lawyers as to whether the applicant has sufficient credentials for ENTRY to practice law, to enable him to BEGIN to acquire enough experience to approach some acceptable level of competence in whatever sub-area of the law he practices. The matter of credentials for ENTRY, for a BEGINNING, once determined, once conclusively determined by a judicial authority with jurisdiction, is claim and issue precluded through the Full Faith and Credit clause of the United

States Constitution, between the applicant and the entire profession of judges and lawyers throughout this nation.

> "The application of the doctrine of res judicata does not rest in discretion." Hilton v. Guyot, 159 U.S. 113 (1895)
>
> "Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 525,553 (1931)
>
> "...final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores, Inc. v. Moitie, 101 S.Ct. 2424,2427 (1981); and Allen v. McCurry, 449 U.S. 90, 94 (1980)
>
> "...once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Allen v. McCurry, 449 U.S. 90, 94 (1980)

Note also that excessively parochial and provincial interests of soverign jurisdictions such as the States of the United States (and not the various United

States District Courts), are only relevant with regard to a conflict between statutes of the States. With regard to judicial proceedings such as judgments (and admission to the practice of law), it is only national policy, not the interests of the various jurisdictions, which can serve to limit the scope of Full Faith and Credit. Magnolia Petroleum Co. v. Hunt, 320 U.S. at 437. Any limited exceptions are only for this Court to create as the ultimate interpreter of the Constitution; not the various jurisdictions themselves. Magnolia, 320 U.S. at 438. There has been no creation by this Court of an exception to Full Faith and Credit with regard to the public acts, records, and judicial proceedings by which one is admitted to the practice of law in a court of this nation, federal or State, so none can be assumed to exist, and Full Faith and Credit must be constitutionally accorded to that which is thus actually determined.

And, this Court has repeatedly held that the Full Faith and Credit clause is an instrument of national unification so that decisions judicially established in any part of this nation are given nation-wide application. Magnolia, 320 U.S. at 439; Williams v. North Carolina, 317 U.S. 287, 294 (1942); Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). And more recently, in Thomas v. Washington Gas Light Co., 448 U.S. at 271; and most recently, in Allstate Ins. Co. v. Hague, 449 U.S. 302, 322 (1981):

> "The Full Faith and Credit clause is one of several provisions in the federal Constitution designed to transform the several States from independent soverignities into a single unified Nation." (citing Thomas at 271)

The Full Faith and Credit clause is designed to avoid multiple and contradictory determinations among the various jurisdictions of this nation, Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942), and the ensuing confusion that

thereby results. It keeps duplicate judicial proceedings to a minimum by permitting the first judiciary that may properly exercise jurisdiction to resolve an issue finally; and thus permits the federal system to function smoothly.

The last thing desired of any judicial proceeding is any doubt as to its validity and finality. By determining the effect of a public act, record, or judicial proceeding within a jurisdiction, that jurisdiction thereby determines through the Full Faith and Credit clause the effect of that determination throughout the entire nation. Within any jurisdiction, especially the various federal U.S. District Courts, the judicial determination; that a graduate of an accredited law school demanding admission as of right to ENTRY to the practice of law, to BEGIN to practice law; has sufficient credentials to do so; is FINAL. Therefore, through the Full Faith and Credit clause, it is

FINAL throughout the nation.

What is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in a court, federal or State, of this nation should be found by this Court, after a long-overdue serious in-depth inquiry, to truely be: that one has sufficient credentials for ENTRY to the practice of law, to BEGIN to practice law. This petition specifically disclaims any automatic licensing in one jurisdiction because of a license in another. Or that each jurisdiction should not have the power to set their own criteria for such licensing. What is solely placed in issue is whether or not that which is actually determined by such licensing, whatever that may ultimately be found to truely be, is precisely what is required to be accorded Full Faith and Credit by every court, federal or State, within this nation.

Immediately upon this Court deciding that Full Faith and Credit must be accorded by the federal U.S. District Courts alone, or also by the State courts, to some particular subset of that which has been by this Court ascertained to be that which is actually determined by the admission to a previous court, the States and the federal U.S. District Courts are free to institute whatever new and different criteria for admission to the practice of law before themselves that they wish. Only that particular avenue of restriction found by this Court to violate Full Faith and Credit is foreclosed to them. Thus there is still no automatic licensing, or a withdrawal from the courts of the power to set their own admission criteria.

It is not respect for a sister-state judicial proceeding, but rather NATIONAL UNIFICATION that is at the heart of the Full Faith and Credit clause of the United

States Constitution. And always, no matter who the decision-making body is, collateral attacks upon the decision, such as lack of personal jurisdiction and due process, and other constitutional safeguards, can always be made.

Full Faith and Credit:

> "...is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, soverign States into a nation." Sherrer v. Sherrer, 334 U.S. 343, 355; quoted with approval by the Court in Thomas v. Wash. Gas Light Co., 448 U.S. 261, 271 (1980)

> "...Local policy must at times be required to give way, such is 'part of the price of our federal system'". Sherrer v. Sherrer, p.355

Full Faith and Credit's purpose is to unify: "That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provisions..." Milwaukee v. M.E. White Co., 296 U.S. 268, 277

Full Faith and Credit is the rule: "The faith and credit given is not to be niggardly but generous, full." Johnson v. Muelberger, 340 U.S. 581, 584

Without the according of Full Faith and Credit by this Court to that which is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law, we remain with the current situation being a mockery of this Court's statement in Schware v. Bd. of Law Examiners, 353 U.S. 232, 239, nt. 5:

> "Certainly the practice of law is not a matter of the State's grace."

*

There is no applicable exception

That which is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in one jurisdiction within this nation falls within the definition of what must by the terms of the U.S. Constitution be accorded Full Faith and Credit in all other jurisdictions within this nation.

As among the federal U.S. District Courts (83-1155 CA 10), which all exist under the same sole soverign, and which all answer to the same sole authority, this court, there are absolutely no even theoretical obstacles to the accordance of Full Faith and Credit.

As among the States, (82-1092 CA 10), a judicially-evolved class of exceptions to the according of Full Faith and Credit in these matters has come into being concerning matters in which, because of the

federal Constitutional system of dual soverignity, the States successfully assert a reasonable strongly-held interest in following their own policy regardless of what other States' policy may be in that area.

The dogmatic assertion that currently experienced admission-to-the-practice-of-law proceedings are a determination of a "minimal competence" to so practice arguably brings the matter within such an exception. Since, if it is in truth such a determination, the judiciary of each jurisdiction reasonably wishes the latitude to draw on their own a line as to where and what does, and what does not, constitute a "minimal competence" for the particular populace served by them, in response to their own detailed familiarity with the particularities of its legal service requirements.

With a clear intelligent observation that it has not been demonstrated or

proved that currently experienced admission to the practice of law proceedings are such a determination, the purported exception vanishes, and Full Faith and Credit constitutionally must be accorded.

Exhaustive evidence is now of recent years available which quite clearly exposes this non-demonstration and non-proof, and which actually demonstrates and proves the opposite.

This evidence is summarized in the Appendix to this petition, under the heading "Enhancing the Competence of Lawyers".

*

Since it is thus now seen that the factors determining competence are hardly touched, if at all, by currently experienced bar examinations, "competence" or even more, "minimal competence", cannot thus be that which is actually determined by the public acts, records, and judicial proceedings by which one is currently

admitted to the practice of law within this nation.

Not being that which is actually determined, the purported exception to the according of Full Faith and Credit to any part whatsoever of the public acts, records, and judicial proceedings by which one becomes admitted to the practice of law; vanishes; and Full Faith and Credit constitutionally must be accorded to that which is actually determined in that previous admission.

Note that it is not necessary to have previously ascertained just what precisely it is that is actually so determined, in order to do away with the purported exception based upon a "minimal competence", or "competence" characterization.

The burden of sustaining and proving an alleged exception to a rule is upon those who allege that exception. Failing that proof, the rule continues to control.

With merely an awareness that it has not been demonstrated or proved by those who would allege it that their characterization to which they would attach an exception is valid, no exception operates upon the rule of Full Faith and Credit, regardless of when and what characterization is ultimately found to be, in truth, actually valid.

Nor is it relevant to characterize that which is actually determined by the proceedings by which one is admitted to the practice of law as being an element, or component, of "competence" or "minimal competence", since a strongly-held policy interest would arguably attach only if it were competence itself, not an element or component thereof, that was alleged to be thus determined.

The ability to speak and write the English language is clearly an element or competent of legal "competence"; but yet it obviously could not be successfully

asserted that there is a reasonable strongly-held policy interest of a State in not according Full Faith and Credit to the public acts, records, and judicial proceedings of a sister State which determined that one was able to communicate in the English language.

Clearly, a slice of a balloon is not the same entity as the balloon itself; the balloon itself possesses the synergistic quality of being able to retain a quantity of air; the slice does not.

This Court has been requested by petitioner here to DECIDE what it is that is <u>actually</u> determined by the admission to the practice of law within this nation; and then to DECIDE what subset of that is entitled to constitutional Full Faith and Credit. Petitioner most emphatically and quite passionately proposes that that which

is actually determined and that to which constitutional Full Faith and Credit must be accorded is that:

THE PREPARATION-TO-BEGIN-THE-PRACTICE--OF-LAW HAS FINALLY AND CONCLUSIVELY

E*N*D*E*D!!!

* *

POLICY CONSIDERATIONS

"Competence" or "minimal competence" being thus seen to not be that which is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in a court of this nation; what then precisely IS it that is thus determined is a question of national policy, to be decided by this Court after a long-overdue careful weighing of all perceived relevant policy considerations.

The abject non-intelligence of current bar admission procedures

Nonsensical allegations to the contrary; in the Law, COMPETENCE is, and always has been, a matter of CHARACTER, not intellect. The absence of competence.....incompetence.....simply occurs whenever one has not taken the time, not expended the energy, or not made the effort sufficient to result in the job being well done; including passing on to others a task one

cannot handle adequately. Not to put in the time, not to expend the energy, not to make the effort, are temptations that continually inevitably occur to the busy person. For these temptations not to eventually become irrestible requires a depth of character, a sense of morality, a clarity of purpose, of a continuous intensity sufficient to dispell them. Actions speak infinitely louder than words, and any action engaged in by those in authority at variance with their purported ideals is at least subliminally carefully noted by those under that quthority. And then when temptation arises not to follow those ideals, the precedent of the actions of that authority gives its heavy weight to the abandonment of those ideals also by those under that authority.

When the judiciary permits, tolerates, and thus encourages the abject degeneracy of the deliberate destruction of the character, and thus inevitably the competence,

of the members of the legal profession by forcing them as they periodically change their state of residence, as does a large segment of the current population of this nation, to repeatedly jump through the hoops of identical bar exams like so many circus animals; then this example of non-intelligence and/or dishonesty from the judiciary is irresistibly transmitted to and inculcated in the entire profession and then society as a whole. The sad fact is that today professional legal competence has become, because of such degeneracies as multiple entry-level bar exams, a theoretical concept to be discussed metaphysically, rather than being a vibrant actuality which is transmitted dynamically by example from one generation of integrity to another generation of integrity.

The continued adamant non-intelligent persistence of the judiciary in maintaining the existence of multiple entry-level

bar exams continues to corrupt the character, and thus the competence, of the entire profession; the effects of such evil corruption sorrowfully being destined to persist for at least a generation after such time as intelligent perception finally calls a halt.

The obscuring of inquiry into the actual fact of what precisely it is that is determined by admission to the practice of law, by the convenient dogmatic subterfuge that "minimal competence" is what is thus determined, has led to the superficially logically-appearing diversionary tangent that each court has a responsibility to make such a determination and draw such a line on its own, regardless of how others have already done the identical thing. (Even though they then generally abdicate this asserted responsibility.) But a direct factual conscientious inquiry into the matter yields the clear inescapable observation that it is simply observa-

tionally and logically impossible for a "minimal competence" to be in such a manner determined.

To the lazy mind, a theory by which a dynamic quality is reduced to a static one is inevitably irresistible. The dynamic ever-changing quality of professional competence is too much to handle for the judiciary mind which has become dulled and deadened through decades of numbing manipulation of conceptual knowledge, rather than the daily rejuvenating clear insight of intelligent observation. Thus the inane theory that it is an inate static quality of "minimal competence" that is determined by entry-level admission to the practice of law is retreated to in desperation to maintain an inner illusion of having effectively dealt with the matter of professional competence.

Intelligent observation of the matter cannot but leave one with the clear insight that no more can even possibly ever

be determined by entry-level admission to the practice of law, than that at one specific cross-sectional moment in time, one had a certain familiarity with the terminology and history of the law. Once determined by an authority of competent jurisdiction, the matter of entry, not static hypothetical competence, has been conclusively determined. Once conclusively determined, all other jurisdictions within this nation must accord Full Faith and Credit.

Either actually believed in, or merely as a cloak of semi-plausible respectability over the rotton core of anti-competetive monopolistically-exclusive economic protectionsim that continues to corrupt the moral integrity of the entire profession, multiple bar exams must come to an end.

Factually, it is quite readily observed that multiple entry-level bar exams have not produced a high degree of pro-

fessional competence within the legal profession. Mirages aside, it is then seen clearly that the anti-competitive nature of these multiple entry-level bar exams have produced and continue to produce a corruption and degeneration of the moral fiber and moral integrity of the entire legal profession of incredible proportions.

Somehow or other, the judiciary has apparently become enormously emotionally attached to this dim lamp of the bar exams on which they have expended, and continue to expend, enormous efforts to polish. They simply find it impossible to let it go, to let it die naturally, having served its limited purpose, and to move on to other, more accurate, more acknowledged as having validity, less character-destroying, approaches to promoting professional competence.

Entry-level admission says no more than, at such-and-such-a-time, it was

finally settled by a court of competent jurisdiction, that a static cross-sectional investigation of one's preparation to practice law was adequate to permit one to proceed to demonstrate the actual beginnings of what might take place, take form, as the dynamic, the dynamically ever-changing path of one's professional career.

There can be no true competence, no true integrity, within the legal profession so long as multiple bar exams exist. There can be no true competence, no true integrity, within the profession so long as the approach is an elitist one of character-destroying EXCLUSION, through such techniques as multiple entry-level bar exams, rather than character-building INCLUSION, through such techniques as continuing legal education programs.

All incompetence, all degeneration, all corruption within the profession can be traced back to this initial notificat-

ion and subtle warning to those entering the profession that justice is really only a fairy tale to be used to delude the ignorant masses; and that the cleverness and shrewdness of lawyers who do not allow such silly things as honesty and integrity to obscure their concern for their wallet, is to be emulated.

An extremely bad example is set by the judiciary

It is obvious that the judiciary, in their concern to decide expeditiously an overburden of cases, has forgotten or abandoned or abdicated their primary responsibility in life: to set an outstanding sterling EXAMPLE to the legal profession and to society in general of how to live one's life properly with intelligence and compassion. Not merely to be above even suspicion of degeneracy and pettiness, but to be brillant shining lights unto the rest of humanity of the best that mankind

can aspire to: this is the primary responsibility of the judiciary. Is it not?

Because, like it or not, be it good or bad, current society looks up to the legal profession from the confusion of their daily lives in the mistaken hope and belief that the lawyers can see a bit more clearly through the complexity of modern life so as to live life more sanely, more honestly with less cruelty, less violence than that with which the majority of current society seems to be currently afflicted. And the lawyers look up from their confusion to the judiciary for examples of how to conduct oneself in the midst of ruthless selfishness with intelligent selfless compassion.

Thus, when the judiciary either intentionally or through negligence lapses into pettiness or arrogant insensitivity or other non-intelligent behavior, this is immediately perceived by the lawyers as an accurate indication of how life

really is, and what type of behavior is currently acceptable, and therefore that which they should emulate. And so the non-intelligent behavior of the judiciary becomes that of the lawyers. The rest of society seeing their models of behavior, the legal profession, engaged in degenerate behavior, therefore do likewise. And thus the current viciousness of modern society is disseminated.

Suffering from their occupational hazard of a brain numbed by ceaseless conceptual manipulations, the judiciary of this nation has become mired in petty power struggles as to where the power of exclusion-from-the-profession lies. If the legal profession were currently actually an honorable one, rather than only theoretically, there would be no desire to exclude anyone, but rather, a desire to include as many as possible within it so that the spirit of selfless service to mankind might be more widely pro-

pagated. This not being the case, nor even being striven towards, the profession and the judiciary progressively continually degenerate further and further towards greater insulative isolative eliteness, following the lamentable example of the physicians.

This degeneration must be halted. Helping considerably would be a removal of the regional xenophobia within the profession by permitting free unrestricted movement of lawyers across the nation, by considering admission to the practice of law anywhere to be the admission to the practice of law everywhere; at least among the U.S. District Courts.

Such an example of enlightened brotherliness from the judiciary, if genuinely sincere and not grudgingly, would perhaps spread throughout the profession and from there to the rest of society, and would assist the hope that mankind will not end up obliterating itself.

*

The object DANGER is simply not seen

The dogmatic reliance and insistence upon the sanctity of the bar exams comes from a judicial direction of yearning for consistency, for certainty, for uniformity of plan and structure which comes from an effort to reduce the actual dynamic quality of legal professional competence to a conceptually manageable static quantity. Is it not clear that the most consistent, most certain, most uniform plan and structure can only be that of continual enthusiastic intelligent observation of what the actual current fact IS?

Unfortunately, the judiciary of this nation has lost sight of what multiple entry-level bar exams are actually doing to the self-respect and spirit of the profession, and they continue to focus only upon what theoretically should be happening.

There is a profound difference between the actual and the theoretical. If one focuses one's attention on the actual, and does not for an instant lose sight of it, then one can at the same time coherently discuss the theoretical in the context of the actual which one continues to closely observe all the while one is discussing the theoretical. But if one first, foremost, and primarily focuses one's attention on the theoretical, and disregards the actual (from a mistaken belief that the theoretical is more important), then inevitably one loses sight of the actual (which is of course a shifting, changing, vibrant, dynamic affair), and becomes hopelessly lost in the theoretical, while suffering under the delusion that one is in a place that has some correlation with the actual. (While at best it may possibly have some slight correlation with where the actual used to be before one lost sight of it.)

It does not take an enormous amount of observation to see that if one has the responsibility for the behavior, and therefore the respect, of a group of professional people; but then concerns oneself primarily with how that group should behave, rather than how they actually do behave; one very quickly loses touch with the actual, and therefore very quickly loses the respect of the group. (And of course concomitantly the group thereby loses respect for itself, for having such inept people at its head.)

Having no respect either for itself or for its leaders, the group rapidly, and perhaps irretrievably, degenerates in its attitudes and spirit, and thus its actions; and simultaneously develops more and more elaborate justifications and concealments and obscurations for and of its decline, to itself and to others.

It is therefore immensely intensely important that those responsible for the

behavior of a group SEE for themselves quite clearly the abject DANGER of concerning themselves with how the group should behave under the delusion that they are thereby dealing with how the group actually does behave. And the concurrent delusion that measures instituted to bring the group to the "should" level are actually having any appreciable effect on what the group "does".

With a clear piercing awareness of what the group's behavior actually IS, unobscured by the opaque curtain of what "should" be, the enormous energy released by attention to the actual, comes to focus upon the situation and one deeply sees for oneself quite dramatically, instantaneously, that the actual, not theoretical, dissemination of behavior among human beings is; has always been; shall always be: not by instruction, not by command, not by exhortation,..... but by EXAMPLE!!

Both with regard to this petition, and the profession as a whole, there is no other issue than the absolute necessity for seeing the abject danger to the profession, to society, to humanity as a whole, of not focusing one's energies upon the actual, rather than the theoretical. With a focusing upon the actual current condition of the legal profession within this nation, it becomes obvious that it is not insufficient education, not insufficient training, not insufficient knowledge that has caused the prevalent sloppiness within the profession, but rather insufficient SPIRIT!

Competence is and always has been a matter of character, not intellect. To the extent one is surrounded by those with healthy character and thus healthy spirits, one easily also develops and maintains such character and spirit. To the extent one is surrounded by those who exude precisely the opposite, it becomes

extremely difficult not to do likewise. To the extent one's professional behavior is controlled and dictated by those for whom one has lost respect because of their requiring one to do that which has become meaningless, because of their inattention to the actuality that their meaningless requirements have produced the very condition which the meaningless requirements ostensibly were to counteract; then one's spirits become progressively deeply dampened to the point where one no longer has any enthusiasm for one's professional endeavors, and perhaps life itself, and thus no longer cares about the quality of one's professional work.

Thus, multiple entry-level bar exams destroy the self-respect and spirit of the profession and thereby directly produce incompetence.

At this point, one either finds oneself trapped within an activity which has become manifestly degenerate, or, after

strenuously attempting to point this out to those responsible, one tears oneself loose no matter what the cost from the clutches of degeneracy, and then seeks some activity in life which has a chance of leaving this world a better, rather than worse, place than that into which one was born.

*

The sense of elitist superiority is the primary origin

After a prolonged, intensive, extensive search for the cause, the origin, of this blindness to the actuality of the degeneracy of the spirit of the legal profession within this nation, one uncovers that which palpably seems most deeply responsible: the fatal attachment to a sense of elitist superiority.

Manifested, among many other ways, in the arrogant exclusionary xenophobia of the impediments to free unrestricted transfer of lawyers among the various

judicial jurisdictions of this nation, this sense of elitist superiority has supplanted a sense of beneficial assistance to one's fellow humanity as the nourishment of the spirit for the lawyers of this nation.

A deep sense of one's beneficial assistance to one's fellow humanity is congruently compatible with the universally acknowledged function of the legal profession which is to energetically actively assist in the propagation and dissemination of a strong sense of justice, a strong sense of fairness, a strong sense of right and wrong, among one's fellow humanity.

A deep sense of elitist superiority is congruently compatible with abuse of authority, abuse of power, abuse of responsibility, arrogant xenophobia, the deliberate cultivation of myths enhancing one's sense of eliteness, lack of vibrant enthusiasm for actually doing the best work one possibly can rather than merely creating

the appearance of such, and all the other degeneracies of which the legal profession is currently culpable.

The sense of elitist superiority is an isolative wall created by one around oneself to counteract an inward sense of inferiority brought about by incessant psychological comparison of oneself with others. This comparison is an insidious invidious cultural habit which has produced, and continues to generate, all manner of evil. With such an isolative wall between oneself and the rest of the world, it becomes exceedingly difficult, if not impossible, to see through it to perceive with clarity the profound difference between the theoretical and the actual.

The sense of elitist superiority propagates itself within the legal profession, as elsewhere, through subliminal imitation of the example of those around one. With the cessation of such an example by a significant segment of those within the

profession, such as, and especially, the judiciary, the currently pervasive sense of elitist superiority will wither. As it withers, clarity of perception steadily returns to one's powers of observation; and blindness to the actuality of dissemination of behaviorial patterns through example diminishes and disappears.

According Full Faith and Credit in this petition vitiates the propagation of the sense of elitist superiority within the profession; thus clarifies the perception of the actual; thus elevates the spirit; and thus results in higher quality professional endeavors.

*

Division produces violence

This endless process of examination and re-examination and specialization is a movement of division. Division between those on the one side of the line who have passed or arrived, and those on the other

side who have not and who therefore are regarded as inferior to those who have. This division, this process of division, this attachment to the conceptually-elevated static results of this division is by its essential nature, DIVISIVE.

There can be no true communication, there can be no true co-operation, between those who are divided. All wars, all oppression, all tyranny, all exploitation, all manipulation, among human beings in the entire history of the species has occurred only between those who are divided. Divided as to race, divided as to nation, divided as to color, divided as to caste, divided as to wealth, divided as to position, divided as to status, divided as to occupation, divided as to profession, divided within the profession.

One cannot have been alive for any length of time, and one cannot have especially practiced law for any length of time, without have becoming deeply non-

verbally non-conceptually aware of the ruthless violence, psychologically if not physically, among human beings; especially within this particular culture, this particular society. If one has passionately investigated this appalling fact in any depth at all, one necessarily reaches the observation that this violence occurs, has occurred, shall occur: only through the DIVISION of man against man.

Without division there can be no violence. It is not possible for one in normal health to be violent to oneself. Nor to those extensions of oneself such as spouse, children, parents, and siblings. Nor, if one is sensitive enough, to those further extensions of family, ethnic group, nation, language group, and race. Nor even, if one has been blessed with sufficient energy to penetrate that far, to the entire human species, or to all animals, or even to all life itself. All observed instances of violence to extensions of

oneself occur in moments of forgetfulness of the fact of the extension.

Having seen, in the practice of law or elsewhere, the incontrovertible utter truth that division produces violence, that division among human beings produces violence among human beings; any conscientious lawyer to the extent he is free from divisions within himself such as a sense of elitist superiority; any sensitive human being will for the rest of his life seriously attempt to the maximum extent of his ability and energy to reduce the amount of division among human beings and thus reduce the amount of violence among them.

To the extent such a conscientious sensitive human being has obstacles, barriers, and walls psychologically erected around him unwittingly by himself or knowingly by others, to that same extent are his efforts to reduce this division and thus this violence among mankind, greatly impeded.

It is deplorable enough that a lawyer is required to pass into the divisions, and thus within the insulative barriers, of college education, legal education, and admission to the practice of law before a particular State's courts through the circus hoop of a bar examination. But to further divide, and thus further insulate the legal profession from the public which it nominally exists to serve, not only by the barriers of State boundaries, but also by the barriers of the various federal United States District Courts; is utterly disastrous to any actual substantial benefit that the legal profession could ever even potentially render to the public in diminishing the violence among them.

For, after having endured this series of divisions required by those who control the legal profession, whenever thereafter a lawyer deals with a member of the public either as a counselor or as an opposing advocate, true communication and true

co-operation is effectively blocked between them to the extent this division and barrier of education learning position and status is present in the minds of either or both of them.

To the extent a lawyer is brutalized by those who control the legal profession into exerting inordinant time, effort, energy, and pains to pass through the hierarchy of the divisions and barriers within the profession; to the extent that the nonsense and ignominy of this demeaning tribulation is rationalized and justified by those who endure it by attributing to themselves a sense of psychologically-comforting elitist superiority; to this same extent is it not possible for there not to be this divisive barrier to true communication and true co-operation between the legal profession and the public.

So long as this division, this barrier exists; then at least for so long

will there be an impossibility of transforming the nature of the legal profession from one of violent aggressive advocacy into one of intelligent beneficial assistance in the peaceful resolution of the inter-personal conflicts of one's fellow man; for at least so long will there be culturally disseminated the tradition of the acceptability and inevitability of violence among mankind.

According Full Faith and Credit to that which is <u>actually</u> determined by admission of one to the practice of law in one court of this nation, federal or State, to all other applications for admission to practice law subsequently by one, will significantly reduce the division of the legal profession within itself; thus significantly reduce the division of the profession from the public; thus significantly reduce the dissemination and propagation by imitation of example within this culture of division; thus significantly

reduce the psychological violence among mankind.

* *

CONCLUSION TO THE PETITION

The Declaration of Independence of the United States of America, 2nd para.:

> AND ACCORDINGLY ALL EXPERIENCE HATH SHOWN, THAT MANKIND ARE MORE DISPOSED TO SUFFER, WHILE EVILS ARE SUFFERABLE, THAN TO RIGHT THEMSELVES BY ABOLISHING THE FORMS TO WHICH THEY ARE ACCUSTOMED.

Thucydides, The History of the Peloponnesian War, book I, section 141:

> MEANWHILE EACH FANCIES THAT NO HARM WILL COME OF HIS NEGLECT, THAT IT IS THE BUSINESS OF SOMEBODY ELSE TO LOOK AFTER THIS OR THAT FOR HIM; AND SO, BY THE SAME NOTION BEING ENTERTAINED BY ALL SEPARATELY, THE COMMON CAUSE IMPERCEPTIBLY DECAYS.

Edward Gibbon, The Decline and Fall of the Roman Empire, chapter 71:

> ALL THAT IS HUMAN MUST RETROGRADE IF IT DOES NOT ADVANCE.

Thomas Carlyle, The French Revolution book II, chapter 3, 5th paragraph:

> MEANWHILE IT IS SINGULAR HOW LONG THE ROTTEN WILL HOLD TOGETHER, PROVIDED YOU DO NOT HANDLE IT ROUGHLY.

FOR WHOLE GENERATIONS IT CONTINUES STANDING, "WITH GHASTLY AFFECTTATION OF LIFE", AFTER ALL LIFE AND TRUTH HAS FLED OUT OF IT: SO LOATH ARE MEN TO QUIT THEIR OLD WAYS; AND CONQUERING INDOLENCE AND INERTIA, VENTURE ON NEW.

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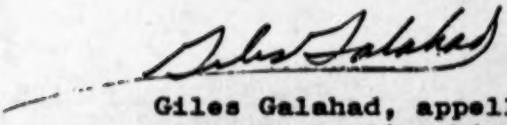

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1983

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GILES GALAHAD Plaintiff-appellant, v. LUCIUS WOODS, et al., Defendants-Appellees.	)	No.82-1092 Civil Action No.81-M-1104 (District of Colorado)

GILES GALAHAD Plaintiff-Appellant v. ZITA L. WEINSHIENK, et al. Defendants-Appellees.	)	No.83-1155 Civil Action No.81-BJ-1205 (District of Colorado)

ORDER AND JUDGEMENT

Before HOLLOWAY, TIMBERS*, and LOGAN, Circuit Judges.

Giles Galahad, after establishing residence in Colorado, took and failed the Colorado bar examination. He then brought an action in federal district court against members of the Colorado State Board of Law Examiners and the Colorado Supreme Court, challenging the Colorado grading system and bar admission

practices on various theories. Inter alia, he sought to force the state authorities to admit him to membership in the Colorado bar. The trial court denied relief, from which Galahad perfected appeal No.82-1092. In this court he argues only that the Full Faith and Credit Clause of the United States Constitution requires these Colorado officials to treat his bar admissions in Pennsylvania and Alaska as conclusive judicial determinations of his competence to practice in Colorado, requiring his admission to the Colorado bar.

Galahad also applied for admission to the Federal District Court for the District of Colorado. His application was denied under Rule 1 (a) of that court, which requires applicants to be licensed to practice in the courts of the State of Colorado. Thereafter, Galahad sued all Colorado federal district judges, raising essentially the same grounds for relief as in his state court action. When the assign-

ed judge denied relief, Galahad perfected appeal No. 83-1155 to this court. In that appeal he also raises only one issue--whether the Full Faith and Credit Clause requires his admission to the bar of the Federal District Court for the District of Colorado.

We affirm the denial of relief in both cases. We are satisfied that we have jurisdiction to consider the constitutional argument relied upon by Galahad in this appeal. See District of Columbia Court of Appeals v. Feldman, __ U.S. __, 51 U.S.L.W. 4285, 4291-92 (Mar. 23, 1983) . Galahad misconcieves the proper application of the Full Faith and Credit Clause. That clause does not require either Colorado or the federal district court in Colorado to accept bar admission in Pennsylvania of Alaska as satisfying the requirements for admission to the bar imposed by the Colorado Supreme Court or the federal district

in that state. See, e.g., O'Neal v. Thompson, 559 F.2d 485, 486 (9th Cir. 1977) ; In re Avery, 44 Hawai 26,352 P.2d 607, 609 (1959) ; In re Rogers, 194 Pa. 161, 46 A. 668, 669 (1899) ; In re Schatz, 80 Wash. 2d 604, 497 P. 2d 153, 157 (1972) . See also In re Wasserman, 240 F. 2d 213, 214-16 (9th Cir. 1956) (federal admission).

(signed)
Howard K. Phillips, Clerk

*Honorable William H. Timbers, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
SEP. 02, 1983

Howard K. Phillips, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 81-M-1104

GILES GALAHAD, Plaintiff, v. LUCIUS WOODS, et al., Defendants.	FILED-U.S. DISTRICT COURT Denver, Colorado Jan. 12, 1982 James R. Manspeaker clerk

MEMORANDUM OPINION AND ORDER

Giles Galahad brought this action against the members of the Colorado State Board of Law Examiners and the Colorado Supreme Court, individually and in their official capacities, challenging the adoption and application of certain rules governing the July 1980 Colorado Bar Examination. Mr. Galahad is a member of the Alaska and Pennsylvania bars. He received a score of 71.4 on the July 1980 Colorado Bar Exam. Although the minimum passing score was 70, Mr. Galahad was notified that due to Grading Standard C, he had not passed the examination and was not recom-

mended for the admission to the bar.

The July 1980 Bar Exam consisted of two tests, the Multistate Bar Examination ("MBE"), containing 200 multiple choice questions, and the Essay Test, containing 6 essay questions. Colorado Supreme Court Grading Standards A through E established the criteria by which an applicant's performance on the entire examination was evaluated. Standard A defined the "essay graded group" as those examinees who had a raw score of 145 or less on the 200 MBE questions. According to Standard B, "If an examinee has a raw score of 146 or more of the 200 questions, he or she will have passed the bar examination, and his or her essay examination will not be considered or graded.

The essay graded group could have passed the examination under the criteria of either Standard D or E. However, Standard C added a limitation that: "Any examinee in the (essay graded group) who

fails more than three of the essay subjects, shall fail the entire examination."

Standard D provided a formula for the computation of a passing score based upon the combination of the essay and MBE scores. Standard E established the criteria for passing the bar examination entirely upon performance on the essay examination without consideration of the examinee's MBE scores. To meet the requirements of Standard E, the examinee must have passed four of the six essay subjects with a score of 70 or more and have attained an average score of 72 on the entire essay examination.

Mr. Galahad did not perform sufficiently well on the essays to pass the examination under Standard E. He was placed within the essay group, indicating that his graded performance on the MBE was below the 146 points required to pass the examination under Standard B on the MBE alone without consideration of his essays.

He also failed to pass the examination under Standard D, because although his overall score was above the minimum passing score of 70, he failed four of the essay subjects and therefore was precluded from passing the exam by Standard C.

Mr. Galahad did not obtain review of his essay examination answers. Rule 217 of the Colorado Rules of Civil Procedure prevented a first-time examinee from attaining review of his essay questions. For such an applicant, re-examination was deemed to be review of the first examination.

The Complaint and the Amended Complaint present seven claims for relief. Mr. Galahad contends that the adoption and the application of Standard C violates due process and equal protection guaranteed by the Fourteenth Amendment to the U.S. Constitution, and that Rule 217, Colo. R. Civ. P., as applied and as written, violates the due process clause of the Fourteenth Amend-

ment. He alleges that the application of Standard C and Rule 217, Colo. R. Civ. P., deprive him of his constitutional rights, in violation of 42 U.S.C. # 1983. Mr. Galahad requests the full faith and credit be afforded the determinations by the States of Alaska and Pennsylvania that he is competent to practice law in those states. Finally, the plaintiff alleges that the application of Standard C and Rule 217 unlawfully restrict competition within the State of Colorado, in violation of 15 U.S.C. # 2. He requests damages, injunctive and declaratory relief.

Effective with the July 1981 Colorado Bar Examination, the Colorado Supreme Court Grading Standards were amended and Standard C eliminated. Rule 217, Colo. R. Civ. P., was revised. The revised rule entitles any unsuccessful examinee to reasonable inspection of his essay question answers upon timely written request to the Director of Law Examiners. These amendments render

plaintiff's claims moot to the extent that they request prospective injunctive relief against the application of Standard C and Rule 217.

Plaintiff alleges jurisdiction under 28 U.S.C. ## 1331 and 1343 (3). A federal district court lacks jurisdiction to review a state court's decision denying admission of a particular applicant to the state bar. If such a complaint is reviewable at all, it is within the jurisdiction of the Supreme Court of the United States. Doe v. Pringle, 550 F. 2d 596 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977). To the extent that the Fourth Claim for Relief seeks a review of the plaintiff's actual performance on the July 1980 examination, it is beyond this court's jurisdiction.

This court does not have jurisdiction to review the admission rules and their general application for alleged con-

stitutional infirmity. Fairly read, plaintiff's Fourth Claim for Relief alleges that Rule 217 deprives the first-time examinee of due process. However, the applicant does have the opportunity to retake the examination, and that satisfies the due process requirements that grading errors be reviewed. Whitfield v. Illinois Board of Bar Examiners, 504 F. 2d 474 (7th Cir. 1974). The plaintiff's adamant refusal to retake the examination does not entitle him to a greater degree of due process than other applicants.

Mr. Galahad's challenge to Standard C is based upon substantive due process. The appropriate standard to review any qualification imposed by the state before admitting an individual to its bar is that it must have a rational connection to the applicant's fitness or capacity to practice law. Younger v. Colorado State Board of Law Examiners, 625 F. 2d 372 (10th Cir. 1980). Plaintiff protests that the empha-

sis which is placed by Standard C upon the essay segment of the exam is irrational because essays do not evaluate legal competence.

Essay examinations are widely used in law schools and bar admission tests. They test the examinee's ability to recognize a legal issue and to analyze it based upon the general knowledge which can be expected to be possessed by law school graduates. Such tests evaluate both legal reasoning and knowledge of the legal fields to which the question relates. It cannot be said that such tests are not rationally related to an applicant's fitness and capacity to practice law. Chaney v. State Bar of California, 386 F. 2d 962 (9th Cir. 1967), cert. denied 390 U.S. 1011 (1968); Feldman v. State Board of Law Examiners, 438 F. 2d 699 (8th Cir. 1971); Tyler v. Vickery, 517 F. 2d 1089 (5th Cir. 1975), cert. denied 426 U.S. 940 (1976).

Additionally, plaintiff alleges that as currently graded, more points are awarded for recognition than for discussion of the legal issues on essay question answers. The recognition of a legal issue is fundamental to the practice of law. No claim of irrationality can be stated merely because the MBE also tests the ability to recognize legal issues. It is not this court's role to weigh the various approaches to test legal reasoning. That is the province of the state. This court can only consider the rationality of the relationship of the adopted method to the governmental objective of limiting the authority to practice law to those who are competent to give legal service.

Finally, plaintiff alleges that subsequent deletion of Standard C amounts to admission by the Colorado Supreme Court that Standard C was irrational. The possibility of other procedures which the state could follow does not undermine the

the rationality of a rule. The decision to delete Standard C is simply irrelevant to the rationality of that rule.

Mr. Galahad's equal protection claim against Standard C presumes to establish a discriminated class of those who are "technogically educated". The parameters of technological education, as opposed to all other education, are not delineated. Plaintiff's allegation is based upon his further assumption that the technogically educated render better performance on objective multiple choice examinations than on subjective essay tests and that this is because technology deals substantially in facts, as opposed to "the endless theories, suppositions, and hypotheses of other areas of human endeavor". However, should such a class exist, it would have to be narrowed in this case to exclude the technologically educated who were not included within the essay graded group because they passed the examination on the MBE. So limited, the

class is of those technologically educated who do not perform sufficiently upon objective multiple choice questions to score 146 out of 200 points. Such a class cannot be recognized.

The question of whether a classification denies equal protection cannot be answered simply by its chance effect upon a particular individual. It, too, is dependent upon an analysis of the reason for the classification. In the absence of an invidious discrimination, a rational relationship to the governmental objective is all that is required. Accordingly, the equal protection claim fails under the same reasoning given for the rejection of the claim of denial of substantive due process.

Accordingly, plaintiff's First, Second, Third, and Fourth claims are dismissed for failure to state a claim. The Fifth claim is simply an assertion that the same denials generate a remedy under

42 U.S.C. # 1983.

In his Sixth claim, plaintiff requests that full faith and credit be afforded his admission to the bars of the states of Alaska and Pennsylvania. Article IV, # 1 requires each state to give full faith and credit to the public acts, records and judicial proceedings of every other state. Although the act of admitting an individual to the practice of law employs the exercise of judicial power, it is not considered to be a judicial proceeding, or a public act of record within the meaning of the full faith and credit clause. Each state has an interest in assuring the competence of attorneys within that state. There is no requirement in the federal Constitution that states open the legal practice within their boundaries to those who have been determined to be qualified in other states.

Finally, Mr. Galahad attacks the application of Rule 217 and Standard C under

the antitrust laws. Claim Seven of the original complaint asserted that by the application of Standard C and Rule 217, defendants, as a part of official state policy, have unlawfully attempted to restrain competition among lawyers in violation of the Sherman Act, 15 U.S.C. # 2. The Amended Complaint rewrote this claim as Claim Eight to delete the allegation of official state policy in an apparent attempt to avoid the exemption for state action of Parker v. Brown, 317 U.S. 341 (1943). That effort fails. The exemption clearly applies in this case.

Accordingly, it is ORDERED, that the Complaint, Amended Complaint, and this civil action are dismissed for failure to state a claim upon which relief can be granted by this court.

Dated: January 12, 1982

BY THE COURT:
(signed) Richard P. Matsch,
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GILES GALAHAD, Plaintiff, vs. ZITA. L. WEINSHIENK; JOHN L. KANE, JR.; SHERMAN G. FINESILVER; RICHARD P. MATSCH; JIM R. CARRIGAN; JOHN MOORE; ALFRED A. ARRAJ; FRED M. WINNER; HATFIELD CHILSON, individually and as Judges of the United States District Court for the District of Colorado, Defendants.	Civil No. 81-BJ-1205 MEMORANDUM OPINION

The plaintiff in this action challenges the constitutionality and the legality of Local Rule 1 (a) of the United States District Court for the District of Colorado.[1] In particular, the plaintiff raises

[1] That Rule in pertinent part reads as follows:

> The bar of this Court shall consist of those persons admitted to practice before it. Persons admitted to practice in the courts of the State of Colorado and residing or maintaining an office in Colorado, may be admitted to the bar of this Court upon motion of a member of the bar of the Court repre-

> senting that the applicant is of good moral character...
>
> Rule 1 (a), Local Rules of Practice, United States District Court for the District of Colorado, at 1 (emphasis added).

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objections to the portion of Rule 1 (a) that predicates membership in the bar of this Court upon admission to practice in the Colorado state courts. He seeks damages, declaratory and injunctive relief against enforcement of the Rule, arguing that as a member of the Pennsylvania state and federal bars and the Alaska bar, he is constitutionally entitled to be admitted to practice before the United States District Court for the District of Colorado.

Mr. Galahad does not challenge the residency requirement of Rule 1 (a). Compare Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982). He is a Colorado resident. Rather, he asserts that unlike other Colorado

residents, he should be immunized from the Colorado bar exam by virtue of his admission in other courts of other jurisdictions. He argues for a uniform policy of admission to the federal district courts as a fundamental requirement pursuant to the Due Process, Privileges and Immunities and Full Faith and Credit Clauses of the federal Constitution. Further enforcement of the requirement as against residents who are members of other courts' bars, he alleges, would amount to a violation of the federal antitrust laws as well. See 15 U.S.C. ## 1 et seq. (1976 ed.). The requirement that he pass yet another state bar examination is alleged to be an unwarranted and unlawful impediment to the plaintiff's pursuit of an otherwise lawful occupation or profession. Cf. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111 (1873) (Bradley, J. dissenting).

I. CLAIM FOR DAMAGES

Plaintiff seeks recovery for damages

amounting to 500 dollars per day from the defendants. However, he has joined only judges of the federal district court as defendants to a complaint that describes actions which are fundamentally "judicial" in nature. The federal courts exercise inherent judicial power in regulating the admission, practice and discipline of attorneys. See 28 U.S.C. ## 1654, 2071 (1976 ed.); Rule 83, Federal Rules of Civil Procedure; Matter of Abrams, 521 F. 2d 1094, 1099 (3d Cir. 1975), and cases cited therein. When postured as a challenge to the denial of admission to Galahad specifically, or as a challenge to the general validity of Local Rule 1 (a) on its face, see Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 431 U.S. 916 (1977), the plaintiff's damages claim runs afoul of the doctrine of absolute judicial immunity. See generally Martinez v. Winner, 548 F. Supp. 278 (D.Colo. 1982).

The Supreme Court recently held that absolute immunity derived from the doctrine of legislative immunity applies to insulate state judges from damages liability arising from court rule-making activities. Supreme Court of Virginia v. Consumer's Union, 446 U.S. 719, 731-734 (1980). The court's reasoning in the Consumer's Union case seems equally applicable to rule-making by federal judges.

At hearing, the plaintiff argued that the actions complained of are "administrative" activities not clothed with common law immunity. The Consumer's Union case, which involved the promulgation of rules affecting the admission and conduct of attorneys, sweeps Local Rule 1 (a) into the arena of immune judicial activity. Even in exercising its judgement on an individual petition, a court performs a judicial act. See In re Summers, 325 U.S. 561, 565, 566 (1945); Doe v. Pringle, 550

F. 2d 596, 599 (10th Cir. 1976). The plaintiff's argument is rendered wholly untenable.

To the extent that Galahad seeks money damages as a remedy, his claim is barred.

While the Consumer's Union opinion closes the door to damages claims against judges arising from "judicial" or "legislative" acts, the Court expressly reserved the question of whether judicial immunity bars declaratory and injunctive relief. Id., 446 U.S. at 735-736. Galahad seeks prospective relief, to wit: admission to this Court's bar and a modification of the text of Local Rule 1 (a). Assuming, without deciding, that declaratory and injunctive relief is available as against federal district judges, see id., 446 U.S. at 735 n.13, this Court must now determine whether the plaintiff has stated a claim upon any of the grounds now asserted.

II. FULL FAITH AND CREDIT

Arguing that admission to the bar is a "judicial proceeding" and from the fact of his prior admission to practice before courts in Pennsylvania and Alaska, Galahad urges that his admission to practice before this Court is mandated by the following constitutional requirement:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

U.S.Const. Art. IV, # 1 (emphasis added). While this Full Faith and Credit Clause does not in express terms bind the federal courts, it is well settled that federal courts must give full faith and credit to the judgements of state and territorial courts. See e.g., Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941); Davis v. Davis, 305 U.S. 32 (1938).

Galahad contends that his admission to practice before Pennsylvania and Alaska

courts should be translated using the device of full faith and credit into nearly automatic admission in this Court. He in essence pleads that by "judicial proceedings" he has already been admitted to the practice of law. By denying him instant admission before this Court, he argues, the defendants are denying full faith and credit to judicial proceedings in those other courts.

Congress has prescribed the manner in which full faith and credit is to be afforded to proceedings in other American jurisdictions:

> Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state, Territory or Possession from which they are taken.

28 U.S.C. # 1738 (1976 ed.) (emphasis added).

Plaintiff has offered nothing which demonstrates that the Pennsylvania or

Alaska courts would give their admissions to law practice such sweeping breadth. The U.S. District Court for the Eastern District of Pennsylvania grants admission to practice in the Eastern District of Pennsylvania. The bounadries of the district reflect the limit of that court's power. The limits of the jurisdiction are necessarily the limits of the grant. It neither assumes nor represents that it has granted anything more.

Pursuant to full faith and credit, this Court readily recognizes the fact of plaintiff Galahad's admission to law practice in other jurisdictions. That fact alone may enable Galahad to appear pro hac vice before this court in an appropriate case where he otherwise might not be entitled. Cf. Atchison, T & S.F.R. Co. v. Jackson Railway, 235 F.2d 390 (10th Cir. 1956); Re Belli, 371 F. Supp. 111 (D.Colo. 1974). This Court, however, is not bound to acknowledge that he has been admitted

to the practice of law without reference to jurisdictional boundary.

> Of course, admission to the Bar of one state does not carry with it the right to practice law anywhere else. Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), cert. denied, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 400 (1975); ... The same is true of admission to the district courts of the United States. See Lark v. West, 110 U.S.App.D.C. 157, 289 F.2d 898, cert. denied, 368 U.S. 865, 82 S.Ct. 114, 7 L.Ed.2d 63 (1961);...

In Re Rappaport, 558 F.2d 87,89 (2d Cir. 1977) (footnote and citations omitted); see also 7 C.J.S. Attorney & Client # 26 (1980). In prior cases in which a full faith and credit claim of this kind has been raised, it has been denied as being wholly without merit. E.g., O'neal v. Thompson, 559 F.2d 485, 486 (9th Cir. 1977). While a court may adopt a rule admitting attorneys who are bar members in other jurisdictions as a matter of comity, see Application of Wasserman, 240 F.2d 213, 215 (9th Cir. 1956), the Full Faith and Credit Clause is not absolute...").

The plaintiff's arguments do not compel that such a construction shall now be reached.

III. PRIVILEGES AND IMMUNITIES

Apart from full faith and credit, the plaintiff relies upon the Privileges and Immunities Clauses of the Federal Constitution:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S.Const. Art. IV, # 2.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ...

U.S.Const. Amend. XIV, # 1. At first glance, these clauses would appear to have no bearing upon federal action, such as rulemaking by the federal courts. See United States v. Gordon Kiyoshi Hirabayashi, 46 F. Supp. 657, 661 (W.D.Wash. 1942). Yet it would seem anomalous to hold that the federal government may abridge privileges and immunities of federal citizen-

ship whereas the states may not. Federal privileges and immunities should, therefore, find protection in other constitutional language.[2]

The threshold question here, however, is whether the "right" to practice law amounts to a privilege or immunity of federal citizenship. Plaintiff argues that it does, citing cases such as Livestock Dealers and Butchers Ass'n v. Crescent City Slaughter-House Co., 15 Fed. Cas. 649 (No. 8,408) (D.C.D.La. 1870); but see The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36(1873).

In the first major case construing the language of Art. IV, # 2, Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.D.E.Pa. 1823), Justice Washington held the privileges and immunities of state citizenship to encompass those rights which are fundamental, including the

> right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise;...

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[2] See Twining v. New Jersey, 211 U.S. 78, ("Privileges and immunities of citizens of the United States,... are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens by the Constitution of the United States.") It seems that the privileges and immunities identified in Twining and other cases would readily fall within the meaning of "liberty" in the Due Process Clause of the Fifth Amendment.

Id., 6 Fed.Cas. at 552 (emphasis added). See also Baldwin v. Montana Fish and Game Comission, 436 U.S. 371, 384 (1978). This right to pursue one's lawful occupation in another state is insulated against provincial discrimination by the Art. IV # 2 language. That section "establishes a norm of comity", Austin v. New Hampshire, 420 U.S. 656, 660 (1975), "that is to prevail among the states with respect to their treatment of each other's residents". Hicklin v. Orbeck, 437 U.S. 518, 523-524 (1978). The purpose of that clause, as explained long ago in Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) is

> "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned....".

It prevents "a state from discriminating against citizens of other states in favor of its own". Hague v. C.I.O., 307 U.S. 496, 511 (1939). See also Doe v. Bolton, 410, U.S. 179, 200 (1973).[3]

Article IV, # 2 secures to citizens of other states only the privileges which citizens of the state may have and not the privileges which the citizens of the other state may have in their home state. Hawkins v. Moss, 503 F.2d 1171, 1179-1180 (4th Cir. 1974). The plaintiff herein does

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[3] The language of Article IV, #2 creates no substantive privileges and immunities. It simply requires that when a state affords rights or privileges to its own citizens, it may not deny them to citizens immigrant from other states. See L. Tribe, American Constitutional Law # 6-32 (1978)

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not raise an Art. IV, #2 claim; discrimination by the State of Colorado is not at

issue here.[4]

Rather, the plaintiff argues that

> (t)he privilege of pursuing one's vocation, and the corresponding immunity from impediments thereto, are one of the most obvious of the Priveleges and Immunities that are the essence of national citizenship.

Memorandum at 9 (emphasis added). Mr. Galahad asks this court to give as broad a reading to the Privileges and Immunities Clause regarding national citizenship as was given to the Article IV language in Corfield and subsequent cases. See e.g., Hicklin v. Orbeck, 437 U.S. 385, 403 (1948); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871); Sheley v. Alaska Bar Ass'n, 620, 643 (Alas. 1980). While there is now

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[4] In his memorandum, Galahad makes reference to the "degenerate vicissitudes of Colorado state bar admission practices", id., at 9, but does not allege any denial, for example, of his right to be subject to those practices like any other Colorado citizen.

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substantial scholarly support for an expansive interpretation of the Fourteenth

Amendment's Privileges and Immunities Clause, see e.g., R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 37-51 (1977)[5], the argument that the clause creates a substantive right to pursue one's lawful occupation or profession free from state limitations was laid to rest long ago by the United States Supreme Court. In The Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873), a majority of the Supreme Court expressly declined to "transfer the security and protection of all of the civil rights" which were enumerated in Corfield v. Coryell and other cases "from the states to the federal government", id., 83 U.S. (16 Wall.) at 77, giving the "Privileges and Immunities" of national citizenship a narrow reading.

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[5] See also T. Ely, Democracy and Distrust 28 (1980), arguing that "the most plausible interpretation of the Privileges or Immunities Clause (is) the one suggested by its language--that it was a delegation to future constitutional decisionmakers to protect certain rights that the document

neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."

The Slaughter-House Cases affirmed the police power of the state to limit the privilege of meat cutters to pursue their chosen occupation. In a case immediately following that decision, the Court expressly held that the right to practice law in the state courts was not a privilege or immunity derived from national citizenship. Bradwell v. The State, 83 U.S. (16 Wall.) 130, 138-139 (1873). That view was reiterated years later by the same court. In re Lockwood, 154 U.S. 116, 117 (1894).

In light of The Slaughter-House Cases and its progeny, it is indeed difficult to conceptualize a privilege of national citizenship that requires one's admission to practice before the federal court but is not effective as against the States pursuant to the Fourteenth Amendment. What is

the source of such a substantive privilege in relation to national citizenship? Cases which describe "the practice of law by qualified persons" as "a 'fundamental right' triggering scrutiny under the privileges and immunities clause," Sheley v. Alaska Bar Ass'n, supra, 620 P.2d at 643, are speaking of state citizenship privileges under Article IV, # 2. See also Stalland v. South Dakota Board of Bar Examiners, 530 F. Supp. 155, 159 (D.S.D. 1982); Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982).

While the reasoning of The Slaughter-House Cases has been the subject,[6] it as yet remains the law:

> The restrictive interpretation given the privileges and immunities clause in the Slaughter-House opinion has been consistently followed by the

[6] See e.g., R. Berger, Government by Judiciary, supra; Twining v. New Jersey, 211 U.S. 78, 96 (1908) ("Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than

some of the public men active in framing it intended, and disappointed many others."); McGovney, Privileges or Immunities Clause, Fourteenth Amendment, 4 Iowa Law Bull. 219, 220, 221, (1918) ("This narrower construction... renders it an idle provision, in that it only declares a principle already more amply and more simply expressed in the Constitution.").

> Court. Only once did the Court hold state legislation violative of that clause. Colgate v. Harvey, 296 U.S. 404, 56 S.Ct. 252, 80 L.Ed. 299 (1935). That case was overruled five years later, leaving not a single instance in over 100 years in which the privileges and immunities clause has been an effective restraint on state legislation. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 520 (4th ed. 1975).[7] Even if the plaintiff's action is analyzed as pleading a claim under the constitutional right to travel, see Edwards v. California, 314 U.S. 160 (1941); Twining v. New Jersey, 211 U.S. 78, 97 (1908) ("the right to pass freely from state to state" a

[7] Individual justices have from time to time relied upon the clause. See e.g., Hague v. C.I.O., 307 U.S. 496, 512 (1939) (Roberts and Black, JJ. concurring).

privilege of national citizenship), it fails to state a claim upon which relief may be granted.

> The "privileges and immunities" provision of the Fourteenth Amendment provides no constitutional base for an attack on the Rule. The right of federal citizenship as reflected in the "right to travel" and as protected by this provision is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice...a profession, which is properly subject to state regulation, in any state to which he travels,...

Hawkins v. Moss, 503 F.2d 1171, 1178-1179 (4th Cir. 1974). The plaintiff cites no authority granting him an absolute privilege to practice law, and this Court has found none.[8]

IV. ANTI-TRUST LAW CLAIMS

Plaintiff asserts that requiring persons to pass multiple entry-level bar exams is inherently anti-competitive and

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[8] Sperry v. Florida, 373 U.S. 379 (1963), cited by Galahad, does not deal with the practice of law before the federal courts. It construes a federal patent statute permitting administrative practice by non lawyers. Its holding is narrow and wholly inapposite.

violates the federal anti-trust laws. See 15 U.S.C. ## 1 et seq. (1976 ed.). He disputes the effectiveness of the bar examination technique as a measure of attorney competence, arguing that this "degenerate subterfuge that multiple bar exams ensure professional competence", Memorandum at 6, diverts attention from a deliberate effort to restrict "the numerical quantity of lawyers within the State". Id..

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court applied the Sherman Anti-Trust Act to invalidate a local bar association's mandatory fee schedule as unlawful anti-competitive price-fixing. In Goldfarb, however, the challenged rule dealt with the exchange of money for the services of already admitted attorneys.

In relation to licensing of practitioners, the Court had this to say:

> We recognize that the States have a compelling interest in the practice of professions within their boundar-

> ies, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession". United States v. Oregon Medical Society, 343 U.S. 326, 336 (1952). ...The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts". See Sperry v. Florida ex. rel. Florida Bar, 373 U.S. 379, 383 (1963);...In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no dimunition of the authority of the State to regulate its professions.

Id., 421 U.S. at 792-793 (citations omitted). The interest of the federal courts in similarly regulating the licensing and conduct of those attorneys who appear before them is expressly recognized by congressional enactment. 28 U.S.C. # 1654 reads as follows:

> In all courts of the United States the parties may plead and conduct

> their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therin. (Emphasis added.)

Does one measure the # 1654 rule-making power of the federal courts using the yardstick of the Sherman Anti-Trust Act? The acts are constitutional equivalents. Particularly where Congress appears to have contemplated this kind of regulation by the courts, it is appropriate to displace anti-trust law in favor of appropriate court rules. Compare, Princeton Community Phone Book, Inc. v. Bate, 582 F. 2d 706, 715-720 (3rd Cir. 1978) ("state action" exception). Rules for admission necessarily impose restrictions on the number of individuals who might otherwise engage in professional activity. Any government regulation of a trade or profession limits one's ability to compete in wholly free-handed fashion. Yet public policies beyond those embodied in the Sherman Anti-Trust Act certainly

justify regulation of a profession that is "essential to the primary governmental function of administering justice," Goldfarb v. Virginia State Bar, 421 U.S. at 792, and is the repository of significant public confidence and trust.[9]

Local Rule 1 (a) makes no effort to fix the fees of attorneys who practice before this Court. See Goldfarb, supra. Nor does it premise admission to practice upon an attorney's membership in the American Bar Association, or upon participation in activities of the state or local bar associations. Compare Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977). It merely requires that applicants before this Court demonstrate an awareness of local law and practice through their performance on the bar examination, and satisfy the minimum standards of character and integrity required of those who practice before the coordinate system of state

9 See infra, nn. 12-15 and accomp. text.

courts within this jurisdiction.

It is no less appropriate for this Court to make that requirement than it was for Pennsylvania or Alaska to have made it on prior occasions. Plaintiff's conclusory allegations regarding the bar examination process do not state a claim sufficient to survive a Rule 12(b)(6) challenge, at least so far as they are grounded in the anti-trust laws.

V. DUE PROCESS CLAIMS

In his ammended complaint, Mr. Galahad pleads that he is entitled to an order deleting Local Rule 1(a) from this Court's rules of practice on the ground that the Rule "has been, and is arbitrarily non-uniformly and discriminatorily applied." Ammended Complaint , paragraph 20. He alleges that attorneys employed by the United States government are permitted to practice before this Court without compliance with Rule 1(a). Assuming that to be true, the complaint lacks

sufficient well-pleaded facts to justify inferring that such permission was in excess of the provisions of 28 U.S.C. # 515 (a) (1976 ed.).[10]

In any event, Galahad alleges the discriminatory application of Rule 1(a), a suitable basis for some remedies, but not one sufficient to justify the relief sought. Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Unequal application of statutes or rules which are fair on their face

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[10] That section provides that:

> (a) The Attorney General, or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized to conduct whether or not he is a resident of the district in which the proceedings is (sic) brought. (Emphasis added.)

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is not a violation of the equal protection element of constitutional due process

unless there is shown an element of intentional or purposeful discrimination, see Snowden v. Hughes, 321 U.S. 1 (1944), based upon an unjustifiable standard or an arbitrary classification. See Oyler v. Boles, 368 U.S. 448 (1962).

Galahad does not allege discrimination based upon any "suspect" classification; he ascribes no racial, religious, gender-based or political motivation to the defendants' conduct. Ultimately his due process claim must be read as an attack on the rational basis of Rule 1(a) and its logical connection to the goals and policies purportedly served.[11] "Somehow", plaintiff avers, "the judiciary has apparently become enormously emotionally attached to this dim lamp of the bar exams which they have expended and con-

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[11] The bulk of the plaintiff's discussion of his due process claim addresses the rational basis of the bar examination process. See Memorandum at 14-17.

tinue to expend, enormous efforts to polish." Memorandum at 17.

The relative lustre of the Colorado Bar Examination as applied to the plaintiff is the subject of a separate lawsuit. See Galahad v. Woods, No. 81- -1104 (filed June 30, 1981). Plaintiff's own professional competence and personal integrity or character have not been questioned in this proceeding. Instead, Galahad asks this Court to hold -- as a sweeping generalizarion -- that the "dim lamp" of the bar examination process casts unconstitutional shadows as a matter of law.

None of the authorities cited by the plaintiff lend support to his present assertion. With unfortunate irony, the cited cases list the bar examination as an alternative to be preferred over others, such as durational residency requirements:

> The (residency requirement) is not closely tailored to achieving familiarity with local rules and practices. There are other, less intrusive means to meet this end,

> such as testing local rules on the bar examination,...

Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064, 1073 (D.N.H. 1982)(emphasis added); see also Stalland v. South Dakota Board of Bar Examiners, 530 F. Supp. 155, 159 (D.S.D. 1982) ("(T)he requirement of a bar examination serves to determine an applicant's knowledge of state substantive law and procedural rules.") Plaintiff dismisses case law contrary to his arguments as demonstrating "that arrogant xenophobia is cherished dearly by the federal judiciaries." Memorandum at 19. He counters the existing precedents with expressions of philosophy, none of which suffice to make out a claim under the Due Process Clause.

Prior cases, such as Matter of Roberts, 682 F. 2d 105 (3d Cir. 1982), have turned away such challenges based upon analysis of due process very different from the one advanced by plaintiff. Id.,

682 F.2d at 107; see O'neal v. Thompson, 559 F.2d 485 (9th Cir. 1977); Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474 (7th Cir. 1974); Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974); cf. Application of Wasserman, 240 F.2d 213 (9th Cir. 1956). Plaintiff would expand the concept of "liberty" to require a uniform rule of admission to practice before all of the federal district courts. While the idea of a uniform admissions rule has been proposed and discussed, it has not been adopted. See Report to the Jud. Conf. of the U.S., Standards for Admission, 79 F.R.D. 187 (1978) (The Devitt Committee Report); 8 Fed. Proc., L.Ed. Courts # 20.144 at 274 (1982). Nor has it been promoted to the magnitude of a constitutional norm. Indeed, a district court retains "broad discretion concerning admission to practice before it." Raiford v. Pounds, 640 F.2d 944, 946 (9th Cir. 1981); see Hicks v. Committee on Admissions, 439 F. Supp. 302, 304 (E.D. Tenn. 1977).

Many district courts have adopted rules similar to Rule 1(a) and have applied them for years. 8 Fed. Proc., L.Ed. Courts # 20.144, at 273 & n. 94 (1982). A few have adopted much more lenient requirements demanding good character and the fact of prior admission to the bar of any federal district court. See e.g., id.; Rule 5(a), Local Rules, United States District Court for the District of Massachusets (1978).

The Federal Rules of Appellate Procedure liberally premise the admission of counsel to practice before the Court of Appeals upon prior admission

> before the Supreme Court of the United States, or the highest court of a state, or a United States district court,...

Rule 46(a), Federal Rules of Appellate Procedure (emphasis added).[12]

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[12] Rule 46 additionally requires that the applicant be of "good moral and professional character," as borne out in a written personal statement and the motion of a member of the bar of the Court of Appeals.

The Supreme Court, on the other hand, requires bar applicants to have been

> admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceeding the date of application,...

Rule 5.1, Supreme Court of the United States Revised Rules (1981).[13] Local Rule 1(a) plainly satisfies the mandate of 28 U.S.C. # 2071 that such rules shall be con-

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[13] Rule 5.2 further requires that

> (e)ach applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Clerk containing (1) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

sistent with "rules of practice and procedure prescribed by the Supreme Court;" though substantively similar, it is plainly less burdensome. Nor can an Act of Congress be pointed out that is directly contrary to the substance of the Rule. As noted above,[14] 28 U.S.C. # 1654 expressly empowers the federal courts to make rules governing the admission of counsel to practice.

The general rule of practice under that section among the district courts was capsulized in Justice Frankfurter's observation that "a lawyer is admitted into a federal court by way of a state court..." Theard v. United States, 354 U.S. 278, 281 (1957), usually the highest state court within the district[15].

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14 See discussion of antitrust laws, supra.

15 Of course, even "(t)hough admission to practice before a federal court is derivative from membership in a state bar," the federal courts maintain independent control over admission, discipline and disbarment of attorneys in the federal courts. In re Ruffalo. 390 U.S. 544, 547 (1968).

8 Fed. Proc., L.Ed. Courts # 20:144, at 273 (1982). This route almost always requires satisfactory performance on a bar examination.

Certainly it can be said that American constitutional law is not static, and that changing factual circumstances, "the lessons of experience," or new perceptions of constitutional history or societal values are important factors in the evolution and growth of the law. See P. Brest, Processes of Constitutional Decisionmaking 1121-1126 (1975). It can also be said that the present bar admission procedures in the federal district courts are not an airtight guarantee of high quality performance by counsel. See e.g., Report on Standards for Admission, supra, 79 F.R.D. at 193-195. Saying that a procedure is imperfect, however, is not tantamount to saying that it lacks "a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Bar Examiners of

New Mexico, 353 U.S. 232, 239 (1957). Those who have considered the problems have recommended an expansion rather than an elimination of the bar examination for federal bar admissions. See Report on Standards for Admission, supra, 79 F.R.D. at 195-196. To the extent that the plaintiff bases his due process claims upon his general challenge to the bar examination process, his complaint fails to state a claim for which relief may be granted.

Mr. Galahad assumed an awesome burden as the plaintiff in this action. Only three years ago, the Supreme Court observed that "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." Leis v. Flynt, 439 U.S. 438, 443 (1979) (per curiam). The case law refuting the existence of such a requirement in the federal courts is recent in time and without evidence of erosion. See e.g., Matter

of Roberts, 682 F.2d 105 (3rd Cir. 1982); O'Neal v. Thompson, 559 F.2d 485 (9th Cir. 1977); cf. P. Brest, Processes of Constitutional Decisionmaking 1126-1129 (1975).[16]

The power of the federal courts to make rules regarding admission to practice is as old as the Republic itself. Section 35 of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 92, declared

> That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of said courts respectively shall be permitted to manage and conduct causes therin. (Emphasis added.)

That enactment, which preceded the proposal in Congress of the Sixth Amendment by one day, has remained in the Ju-

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[16] The only currently fruitful instances of challenge to bar admission rules seem to revolve around First Amendment issues not raised in this action. See e.g., In re Stolar, 401 U.S. 23 (1971) (plurality opinion).

dicial Code in essentially unchanged ever since.[17] It now is codified as 28 U.S.C. # 1654. "This statute gives mor elaborate expression to the meaning of the terse language of the Bill of Rights" concerning rights to the assistance of counsel. United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964). It was enacted to guarantee those rights of a time when there was a "current state of incertitude regarding the probability of constitutional amendment." J. Geobel, Antecedents and Beginnings to 1801, 1 History of the Supreme Court of the United States 490 (1971).

It is a very long step to conclude that members of the First Congress, many

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17 For a short period following the 1948 revision of the Judicial Code, the language regarding court rules was deleted, but it was quickly reinstated to that section by a 1949 amendment. Act of May 24, 1949, C.139 # 91, 63 Stat. 103

of whom had been members of the federal constitutional convention, set about to grant rulemaking power to the courts that would violate the due process guarantee of the Fifth Amendment that they would soon submit for ratification. The consistent tradition of the grant and exercise of that power since 1789 may itself provide a contemporaneous interpretation of due process and # 1654 that carries great weight. As the Supreme Court has said of an earlier challenge,

> To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irrestible (sic) answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled....

Stuart v. Laird, 5 U.S. (1 Cranch) 298, 308 (1803).

Rulemaking by the courts within their power under 28 U.S.C. # 1654 may prove in-

convenient, even somewhat burdensome to counsel migrating from district to district. That alone does not make it unconstitutional. Perhaps a policy of universal admission to the bar of the district courts will achieve constitutional stature at some time in the future. Or perhaps not. As Justice Blackmun has recently concluded about a very similar claim,

> That kind of reasoning would compel one to conclude that because an applicant is admitted to the Bar of one State, he surely must be admitted to the Bar of any other State. We might reach that frontier one day on some new and as yet undeveloped constitutional concept, but I doubt whether we have reached it yet....

In re Stolar, 401 U.S. 23,33 (1971) (Blackmun, J. dissenting).

VI. A NOTE OF RIPENESS

At hearing on the motions to dismiss, counsel for the defendants additionally urged dismissal of this action on the theory that it was not ripe for adjudication: the plaintiff's other federal law-

suit, Galahad v. Woods, No. 81- -1104 (filed June 30, 1981), may ultimately render him eligible for admission under terms of Rule 1(a), presenting mootness problems in any further proceedings in this action. Until the potential mootness question is resolved, counsel asserted, this action is premature, i.e., "unripe".

This argument wholly blurs the concepts of ripeness and mootness. Both are distinct analytical concepts, grounded upon different concerns. See H. Hart & Wechsler, The Federal Courts and the Federal System 102-149 (2d ed. Bator 1973) ; id., 1981 Supplement, at 20-52 (Bator ed. 1981). That a current controversy may become moot at some time in the future in no way compells this or any other court to do nothing while we wait and see. For whatever value it has, the plaintiff's theories of constitutional right as applied to the existing state of affairs generate a concrete controversy appropriate

-- and ripe -- for judicial determination. The motion to dismiss, insofar as it rests on ripeness, shall be denied.

VII. A FINAL NOTE

It would be useful to at last observe that the plaintiff's individual character and competence in the practice of law are not at issue. The consequences of his membership in the bar of other courts and the legal soundness of Local Rule 1(a) have been in question and have been resolved against him. An adverse outcome as to these latter issues, all must concede, has no bearing on those issues more personal to Mr. Galahad. Those questions must find their answers on some separate future occasion.

For the reasons stated in this opinion, the defendants' motion to dismiss this action pursuant to Rule 12(b)(6) shall be GRANTED. The amended complaint in the above-entitled proceeding shall be

DISMISSED.

DATED this 17 day of January, 1983.

BY THE COURT:

(signed)
BRUCE S. JENKINS
United States
District Judge*

* United States District Judge for the District of Utah, sitting by designation pursuant to 28 U.S.C. # 292(b).

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JAN. 19, 1983

James R. Manspeaker, Clerk

ENTERED ON THE DOCKET
JAN. 19, 1983

James R. Manspeaker, Clerk
By CH (initialed).

That which is ACTUALLY thus determined is NOT "competence"

Of recent history, a convenient overabundance of faith in the bar exams as determining a minimal level of legal competence has been reposed there by the judiciary of this nation. Only quite recently has the abject erroneousness of this characterization been publicly authoritatively exposed.

Within the past few years, a publication has issued from a most highly-respected source concerning the "competence" of lawyers, which here serves as the basis for the following pages.

Reference is made to: ENHANCING THE COMPETENCE OF LAWYERS, THE REPORT OF THE HOUSTON CONFERENCE FEBRUARY 3 THROUGH 5, 1981----------American Law Institute--American Bar Association Committee on Continuing Professional Education, 4025 Chest-

nut Street, Philadelphia, Pennsylvania, 19104. (Cited herinafter as "ALI-ABA Competence").

This publication is a transcription of the sessions of the conference and the pre-conference papers circulated thereto. Over 250 of the most highly-respected and prominent judges, lawyers, and legal educators in the nation attended and discussed all aspects of lawyer "competence".

The experience and integrity of those present cannot be questioned. The decisive impact of what they said cannot be ignored. The significance and weight of their conclusions cannot be overestimated.

The most satisfactory to-those-present working definition of "competence" that was accepted and used at the conference was that taken from a previous ALI-ABA effort, "A Model Peer Review System":

> Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of

> such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. (ALI-ABA Competence, pg. 11, 56)

Which, if any, of the above are even touched by currently experienced admission-to-the-practice-of-law-proceedings?

The following summaries of various detailed studies are abstracted from Russell Burris's pre-conference paper on "Testing in Practice Skills", (ALI-ABA Competence, p. 136 and on).

In a study of the competence of trial lawyers based on the observations of courtroom performances by judges, by Dorothy L. Maddim, "Trial Advocacy Competence, the Judicial Perspective", American Bar Association, 1978 (ALI-ABA Competence, p. 46), 1338 <u>judges</u> responded listing the factors they found to be most important in determining "competence",

which resulted in the following list:

Factors determining competence, judges' list (Maddim Study, ABA)

- Preparation
  - Organization
  - Knowledge of facts of case
  - Knowledge of law applicable to case
  - Knowledge of alternatives to sentencing
- Experience and Training
  - Education or training
  - Experience
  - General Knowledge of Law
  - Knowledge of rules
- Presentation
  - Presentation of case
  - Argumentation
  - Brevity
  - Communication or oral skills
  - General courtroom acuity
  - Client control
- Personal
  - Diligence
  - Courtroom etiquette
  - Ethical behavior
  - Personality
  - Physical appearance
  - Punctuality
- Intellectual
  - Analytical ability
  - Ability to isolate real issues
  - Intelligence
  - Writing skills
  - Objectivity
- Miscellaneous

Which of these, if any, are even touched by currently experienced admission to the practice of law proceedings?

In an extensive study by Anthony Partridge and Gordon Bermat, "The Quality of Advocacy in the Federal Courts. A Report to the Committee of the Judicial Conference of the United States to Consider Standards for the Admission to Practice in Federal Courts", Federal Judicial Center, Washington, 1978, (ALI-ABA Competence, p. 148), 378 federal judges and 488 experienced lawyers were asked to rate the items in which improvement was needed, resulting in the following list of the factors that distinguish adequate from inadequate performance:

Factors determining competence, judges and lawyers list (Partridge & Bermat Study, Federal Judicial Center)

General Legal Knowledge
- Knowledge of federal jurisdiction and venue statutes
- Knowledge of Federal Rules of Procedure
- Knowledge of local court rules and practices
- Knowledge of Federal Rules of Evidence
- Broad, non-specialized knowledge of legal subjects

Knowledge relevant to the particular case
- Relevant facts
- Governing statutory and decisional law

Proficiency in the planning and management of litigation
- Developing a strategy for the conduct of a case
- Recognizing and reacting to critical issues as they arise
- The use of discovery
- The use of pretrial conferences
- Handling settlement negotiations, including judgement as to when a settlement (or plea agreement)is appropriate

Technique in arguing to the Court (other than as a Trier of facts)
- Preparation of memoranda on pretrial matters
- Oral argument of pretrial matters
- Preparation of requests for and objections to jury instructions

Technique in arguing to the Trier of facts
- Opening statements
- Closing arguments

Technique in the examination of witnesses
- The use of direct examination to present the relevant facts clearly
- Offering exhibits (including laying a proper foundation)
- Responding to opponent's objections
- The use of cross-examination
- Rehabilitation of impeached witnesses
- The use of objections (including knowing when to object and the phrasing of objections

Professional conduct generally
- Diligence on behalf of the client
- Observing standards of courtroom decorum
- Compliance with the Code of Professional Responsibility generally
- Avoiding wasting time on matters when the client would be equally well served by expeditious handling

Additional factors in criminal cases
- Skill in representation of bail matters
- Knowledge of exclusionary rules
- Skill in representation at sentencing

Which, if any, of the above are even touched by currently experienced admission to the practice of law proceedings?

A study done by Russel W. Burris, "Countdown on Competency", 3 Learning and the Law 13, (ALI-ABA Competence 151), in conjunction with the director and faculty of the National Institute for Trial Advocacy, developed the following list of factors to be used in evaluating the performance of participants attending the Institute sessions:

Factors determining competence, N.I.T.A. list (Burris Study, N.I.T.A.)

Legal Knowledge and Preparation

- Sufficiency of preparation on law
- Knowledge of evidence rules and trial procedure
- Analyze trial problems, develop solutions
- Scope (judgement regarding inclusion and exclusion of subject matter)
- Sufficiency of preparation on facts
- Organization of legal knowledge
- Offering and using exhibits (proper marking; orderly foundations; placing before the jury)

Performance Skills

- Ability to effectively question witnesses

Use of evidentiary and procedural rules
Adaptability
Handling of objectional matter (timely recognition; phrasing objections; discretion; mastery of rules of evidence)
Response to objections (anticipation and preparation; resourcefulness; avoiding disruption)
Control of witness (including avoidance of unwise open-ended questions
Effectiveness of direct examination (well-framed questions; holding interest; content)
Effectiveness of cross-examinination (control; avoiding harmful responses; insistence on responses)

Performance Style and Presence
Skill in making jury arguments
Apparent ease in the courtroom
General presence (voice, demeanor, ability to hold attention, etc.)
Clarity (avoiding unintended ambiguity; use of language that witness and jurors understand)
Sensitivity and attentiveness (hearing and understanding witnesses, judge and opposing counsel; alertness to impact on jury)
Echoing answers
Distracting mannerisms

Which, if any, of the above are even touched by currently experienced admission to the practice of law proceedings?

The above lists are primarily directed towards trial lawyers, those being more noticeable by the public; how many other lists can quite easily be compiled for

lawyers primarily engaged in other specialties, such as tax law?

In a study by Joe S. Cecil, "The Impact of Clinical Legal Education on Skills Training, Career Choice, and Appreciation of Ethical Issues in the Practice of Law", (Northwestern University unpublished dissertation, 1979), elaborating upon a previous study done by L. Baird, "A Survey of the Relevance of Legal Training to Law School Graduates", 29 Journal of Legal Education 264-294, 1978; (ALI-ABA Competence, p. 144); the following list of factors which proved statistically valid was used:

Factors determining competence, clinical list (Cecil Study, J.Leg.Ed.)

Ability to analyze and synthesize law and facts
Ability to do research
Ability to write (memoranda, briefs, etc.)
Ability to draft legal documents (complaints, answers, contracts, wills, etc.)
Ability to interview clients
Ability to counsel clients
Ability to negotiate with adverse party

Ability to be effective in oral communication
Ability to organize work flow
Ability to investigate facts
Ability to appear in court to argue motions and to conduct hearings and trials
Appreciation of ethical issues in the practice of law
Other

Which, if, any of the above are even touched by currently experienced admission to the practice of law proceedings?

And in a comprehensive study, including investigation into the differing emphasis on different factors among different specialties in the law, by Frances K. Zemans and Victor G. Rosenblum, "Preparation for the Practice of Law--the Views of the Practicing Bar", American Bar Foundation, Chicago, 1980, (ALI-ABA Competence, p. 139), in which data were obtained from the responses by 548 lawyers to a randomly-issued 23-page questionnaire in 1975-76, the following relative importance ordered list of competence factors were obtained:

Factors determining competence, lawyers' list, relative importance ordered (Zemans & Rosenblum Study, American Bar Foundation)

Fact gathering
Capacity to marshall facts and order them so that concepts can be applied
Instilling others' confidence in you
Effective oral expression
Ability to understand and interpret opinions, regulations, and statutes
Knowledge of the substantive law
Legal research
Negotiating
Drafting legal documents
Understanding the viewpoint of others to deal more effectively with them
Ability to synthesize law
Getting along with other lawyers
Knowledge of theory underlying law
Letter writing
Knowledge of procedural law
Financial sense
Interviewing
Writing briefs
Opinion writing
Knowledge of political science, psychology, economics, sociology
Accounting skills

Which, if any, of the above are even touched by currently experienced admission to the practice of law proceedings?

The Zemans and Rosenblum American Bar Foundation study concluded significantly (ALI-ABA Competence, p. 169; Z&R p.17):

"...the skils rated as the most imimportant to the practice of law

were apparently learned outside of law school."

Currently experienced admission to the practice of law proceedings, absent evidence of some character discrepancy, are only a requirement that one be deemed to have passed that jurisdiction's bar exam, which as currently experienced, covers only law school material. Currently experienced law school material does not even begin to cover the factors delineated above in the various studies as determining "competence", as noted quite forcefully by the quote from the Zemans and Rosenblum study.

Some states are more conscientious than others in these matters. On the July 1980 California Bar Exam, the California Committee of Bar Examiners conducted an elaborate set of experiments:

"...to determine the degree to which an applicant's scores on the essay and multiple choice portions of the examination correspond with how well that applicant performs on tasks

> that simulate important facets of legal practice. In other words, the study seeks to discover the extent to which the present examination measures several of the basic legal skills that a newly-licensed attorney should (or is at least expected) to possess." (ALI-ABA Competence,158)

These experiments had all the applicants perform "video" or "research" tasks in addition to the regular exam, and some of the applicants spent an additional two days performing various practice simulated tasks. Preliminary results indicated that:

> "...the experiment appears to have been successful in assessing skills other than those assessed on the traditional bar examinations; the status of 38 participants changed from "fail" to "pass" based on the (practice-simulated tasks) performance." (ALI-ABA Competence, p. 164)

And in a definitive study by Alfred B. Carlson and Charles E. Werts, "Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results", Educational Testing Service, Princeton, 1976, the conclusion reached after exaustive research was that:

"...the data offer no evidence to support the predictive validity of the bar examination; that is, the bar examination as an achievement test of law knowledge is limited in its effectiveness as an assessment instrument to predict competent performance." (ALI-ABA Competence, p.155)

The pre-conference paper concluding that:

"...(these studies) force a re-examination of the usefulness of the bar examination assessment process for predicting competent performance as a practicing lawyer."

Since:

"...THERE IS NO OBSERVED PREDICTIVE RELATIONSHIP BETWEEN BAR EXAMINATION SCORES AND PROFESSIONAL COMPETENCE."

(ALI-ABA Competence, p.168, caps. added)

Finished. The exhaustive, extensive, intensive, authoritative evidence above delineated clearly shows that a characterization of that which is determined by currently experienced judicial proceedings by which one is admitted to the practice

of law as a determination of a "minimal" competence" to so practice, is invalid.

This authoritative evidence has demonstrated that professional legal competence comprises a large number of factors. These factors are hardly touched, let alone measured, by currently experienced admission to the practice of law proceedings, essentially consisting only of a certification that one has passed that State's bar examination.

Since the factors determining competence are hardly touched, if at all, by currently experienced bar examinations; "competence", or even more, "minimal competence" cannot be that which is actually determined by the bar exams, thus cannot be that which is actually determined by the public acts, records, and judicial proceedings by which one is admitted to the practice of law in a federal court of this nation through its abdication of the certification process to the State Courts.

Errors in the order and judgment of the 10th Circuit U.S. Court of Appeals

The sole issue presented by petitioner to the 10th Circuit Court of Appeals in these two by-them consolidated cases was phrased verbatim as in this petition. The arguments there were identical as those here. Thus it is a severe falsehood for their order and judgment to state that petitioner demands that "...these Colorado officials treat his bar admissions in Pennsylvania and Alaska as conclusive judicial determinations of his competence to practice in Colorado..." or "...requires his admission to the bar of the Federal District Court for the District of Colorado." This petitioner's Detailed Elaboration of the Exact Nature of this Petition, which appeared verbatim in the briefs before the 10th Circuit, has and does make it quite clear that NO "conclusive judicial determination" nor automatic admission has or is advocated

by this petitioner. What has been and is sought by petitioner is a serious, long-overdue inquiry into what it <u>is</u> that is <u>actually</u> determined by an admission to practice law within this nation; and a decision as to what subset of that need not be repeated under Full Faith and Credit. That which is falsely stated and presumably seen by the 10th Circuit is simply not a necessary result of what petitioner seeks.

The cases cited by the order and judgment of the 10th Circuit in this matter are not relevant to petitioner's sole issue, the same sole issue there as here.

<u>Application of Wasserman</u>, 240 F.2nd 213,CA 9 '56, was dismissed as not being appropriate subject matter for a final decision capable of being appealed on. In dictum, that court stated, 28 years ago,

that automatic admission should not occur primarily because of the difficulty (in 1956) of obtaining accurate information on an attorney's prior ethical conduct in the previous jurisdiction. That is not this case.

In re Rappaport, 558 F.2nd 87, CA 2 '77, concerned an out-of-state criminal attorney who tried a criminal case pro hac vice which ended in a hung jury, and who was denied permission to re-try the case because of his subsequent suspension from practice in his home state and the necessity of being a witness in the new trial. That is not this case.

O'Neal v. Thompson, 559 F.2nd 485,486 CA 9 '77, was a case in which the 9th Circuit summarily affirmed with no discussion a summary dismissal of the multiple-issue complaint of those who demanded automatic admission because of a previous license. That is not this case.

In in re Rodgers, 45 At. 668, Pa.1899, the State court there in 1899 merely in a one-line per curium decision summarily dismissed without any discussion or elaboration whatsoever a petition for automatic admission based upon admission in another State. That is not this case.

The two Avery cases, Application of Avery, 352 P.2nd 607, and 610, Hawaii (1959 & 1960); from Hawaii, then and now a particularly xenophobic jurisdiction, summarily dismissed in two sentences a Full Faith and Credit claim for automatic admission to practice in Hawaii based upon 50 years of the practice of law in Massachusetts. That is not this case.

In Application of Schatz, 497 P.2nd 153, Wash. 1972, the State of Washington Supreme Court specifically addressed the issue of whether or not Full Faith and Credit would be accorded to California's provisional accredidation of Schatz's law

school, so that Schatz would be permitted to sit for the Washington bar exam. In a divided court, they held not. But the dissent unequivocally stated, at page 164:

> "Since on their face the standards of California for admission to the bar are high and effectual, I think Full Faith and Credit under the federal Constitution should be given the official acts of a sister State."

Even without the clear exposure of the blatant invalidity of the historical characterization of licensing-to-practice-law judicial proceedings upon which a policy exception to Full Faith and Credit has heretofore been generally judicially assumed, which form the basis of the section of this petition entitled "Enhancing the Competence of Lawyers", the Washington Supreme Court found themselves with sufficient fortitude to directly address the issue. It cannot be assumed that this Court will find itself with less.

Office - Supreme Court, U.S.
FILED
MAR 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-960

In the Supreme Court of the United States

OCTOBER TERM, 1983

GILES GALAHAD, PETITIONER

v.

ZITA L. WEINSHIENK, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Braverman, In re, 549 F.2d 913 2

Davis v. *Davis*, 305 U.S. 32 3

District of Columbia Court of Appeals v. *Feldman*, No. 81-1335 (Mar. 23, 1983) 3

Dreier, In re, 258 F.2d 68 2

Feldman v. *Gardner*, 661 F.2d 1295, rev'd, No. 81-1335 (Mar. 23, 1983) 4

Galahad, In re, No. 81-1782 (10th Cir. Oct. 16, 1981), cert. denied, 454 U.S. 1139 2

Leis v. *Flynt*, 439 U.S. 438 4

Migra v. *Warren City School District Board of Education*, No. 82-738 (Jan. 23, 1984) 3

Montana v. *United States*, 440 U.S. 147 4

Rappaport, In re, 558 F.2d 87 4

Roberts, In re, 682 F.2d 105 4

Wasserman, In re, 240 F.2d 213 4

Page

Constitution, statutes and rule:

U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause) 2, 3

Sherman Act, 15 U.S.C. 1 *et seq.* 4

28 U.S.C. 1738 ..... 2, 3

D. Colo. Local Rule 1(a) (1983) 1, 2, 3, 4

D. Colo. Local Rule 300 (Feb. 1, 1984) 1

Miscellaneous:

Restatement (Second) of Judgments (1982) 3

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1. Petitioner failed the examination for admission to the bar of the State of Colorado. He then applied for admission to the bar of the United States District Court for the District of Colorado. His application was denied because he did not satisfy the qualifications for admission set forth in the district court's Local Rule 1(a), which required that applicants be admitted to practice in the courts of the State of Colorado (Pet. App. 1002, 1018).[1] Petitioner then brought these actions in the United States District Court for the District of Colorado.

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[1]The district court's local rules have been amended effective February 1, 1984. Local Rule 300 now governs admission to the district court bar. Like former Rule 1(a), it restricts admission to "persons admitted to practice in the courts of the State of Colorado."

In one action petitioner sued the members of the Colorado State Board of Law Examiners and of the Colorado Supreme Court, challenging the state bar admission procedures and grading system, and seeking admission to the State bar. In a separate action petitioner sued the federal district judges for the District of Colorado, challenging on constitutional and other grounds the district court's Local Rule 1(a). Petitioner's claims were rejected in both actions.

Petitioner asserted in the court of appeals that he had been admitted to the bars of Alaska and Pennsylvania, and that Colorado and the federal district court in that State were required to give full faith and credit to those prior judicial determinations. See U.S. Const. Art. IV, § 1; 28 U.S.C. 1738. The cases were consolidated. The court of appeals, after concluding that it had jurisdiction to consider petitioner's claim, affirmed in a brief per curiam opinion. Pet. App. 1001-1004.

ARGUMENT

The court of appeals' decision in plainly correct, and consistent with the decisions of this Court and the other courts of appeals. It does not warrant further review.

1. We assume that the court of appeals properly concluded that it had jurisdiction to consider petitioner's claim. The denial of admission to the bar of a federal district court is itself reviewable on direct appeal to the court of appeals.[2] See *In re Dreier*, 258 F.2d 68, 69 n.1 (3d Cir. 1958); *In re Braverman*, 549 F.2d 913 (4th Cir. 1976). This Court held in

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[2]After petitioner's application for admission to the federal district court was denied, he first sought mandamus from the court of appeals directing Judge Weinshienk to grant his application. His mandamus petition was denied. *In re Galahad*, No. 81-1782 (10th Cir. Oct. 16, 1981), cert. denied, 454 U.S. 1139 (1982).

District of Columbia Court of Appeals v. *Feldman*, No. 81-1335 (Mar. 23, 1983), however, that "a general attack on the constitutionality of [a r]ule" governing bar admissions does "not require review of a judicial decision in a particular case" (slip op. 25). A federal district court therefore has subject matter jurisdiction to consider such a claim even if the plaintiff was denied admission in an earlier proceeding. This principle would seem to apply in cases dealing with federal court admissions as well as state court admissions. In this case petitioner's complaint could be read as attacking D. Colo. Local Rule 1(a) as a violation of full faith and credit and of 28 U.S.C. 1738 insofar as it required those admitted to the bar outside Colorado to pass the Colorado bar examination.[3]

2. Petitioner's claim that the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1) and 28 U.S.C. 1738 have some bearing on the validity of Local Rule 1(a) is frivolous. The Full Faith and Credit Clause does not apply to the federal courts. *Migra* v. *Warren City School District Board of Education*, No. 82-738 (Jan. 23, 1984), slip op. 5; *Davis* v. *Davis*, 305 U.S. 32, 40 (1938). 28 U.S.C. 1738 does require the federal courts to give "the same full faith and credit" to the "judicial proceedings" of another state "as they have by law or usage in the courts of such State." But by refusing admission to the federal district court in Colorado, the federal court there did not fail to recognize or

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[3]Though we assume that the district court had subject matter jurisdiction, petitioner's claim that Local Rule 1(a) is invalid should be barred as a matter of res judicata by the earlier denial of his motion for admission. We perceive no reason why the issue now presented could not also have been litigated in connection with that earlier motion (and thereafter appealed to the court of appeals). See Restatement (Second) of Judgments § 25 (1982). The defense of res judicata was raised by the federal respondents, but the district court did not address it in its opinion.

enforce the earlier state court determinations admitting petitioner to the bars of Alaska and Pennsylvania. Those determinations are simply not binding (as a matter of res judicata and full faith and credit) on nonparties litigating a different question in the federal courts of another state.

The Colorado federal and state courts did not participate in the Alaska and Pennsylvania admissions proceedings. Contrast *Montana* v. *United States*, 440 U.S. 147, 153-155 (1979). They are thus not bound by the outcome of those proceedings in different actions brought by the formerly successful movant. Moreover, the issue determined in the earlier state proceedings (whether petitioner possessed the necessary qualifications for admission to the bars of those states) is different from the issue petitioner asserts is precluded here (whether he satisfies the requirements for admission to the state and federal bars in Colorado). *Leis* v. *Flynt*, 439 U.S. 438 (1979). For that reason, as this Court has made clear, "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another" (*id.* at 443). The same is true of admission to practice in the federal courts. See *In re Wasserman*, 240 F.2d 213, 214-215 (9th Cir. 1956); *In re Roberts*, 682 F.2d 105, 109 (3d Cir. 1982); *In re Rappaport*, 558 F.2d 87, 89 (2d Cir. 1977).[4]

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[4]Petitioner argued in the district court that the judges of that court, by adopting Local Rule 1(a), had violated the Sherman Act (15 U.S.C. 1 *et seq.*). Pet. App. 1037-1042. This claim is similar in some ways to the one before the Court in *Hoover* v. *Ronwin*, No. 82-1474 (argued Jan. 16, 1984). Petitioner, however, has sued the members of the court for adoption of a rule. Ronwin, by contrast, sued the state bar examiners for limiting admissions in a way not authorized by the state supreme court. See *Feldman* v. *Gardner*, 661 F.2d 1295, 1303-1308 (D.C. Cir. 1981), rev'd on other grounds, No. 81-1335 (Mar. 23, 1983).

The district court rejected petitioner's claim (Pet. App. 1037-1042), and petitioner has not pursued it either in the court of appeals or in this Court. There is thus no reason why action on this petition should be delayed pending the Court's decision in *Hoover* v. *Ronwin*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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